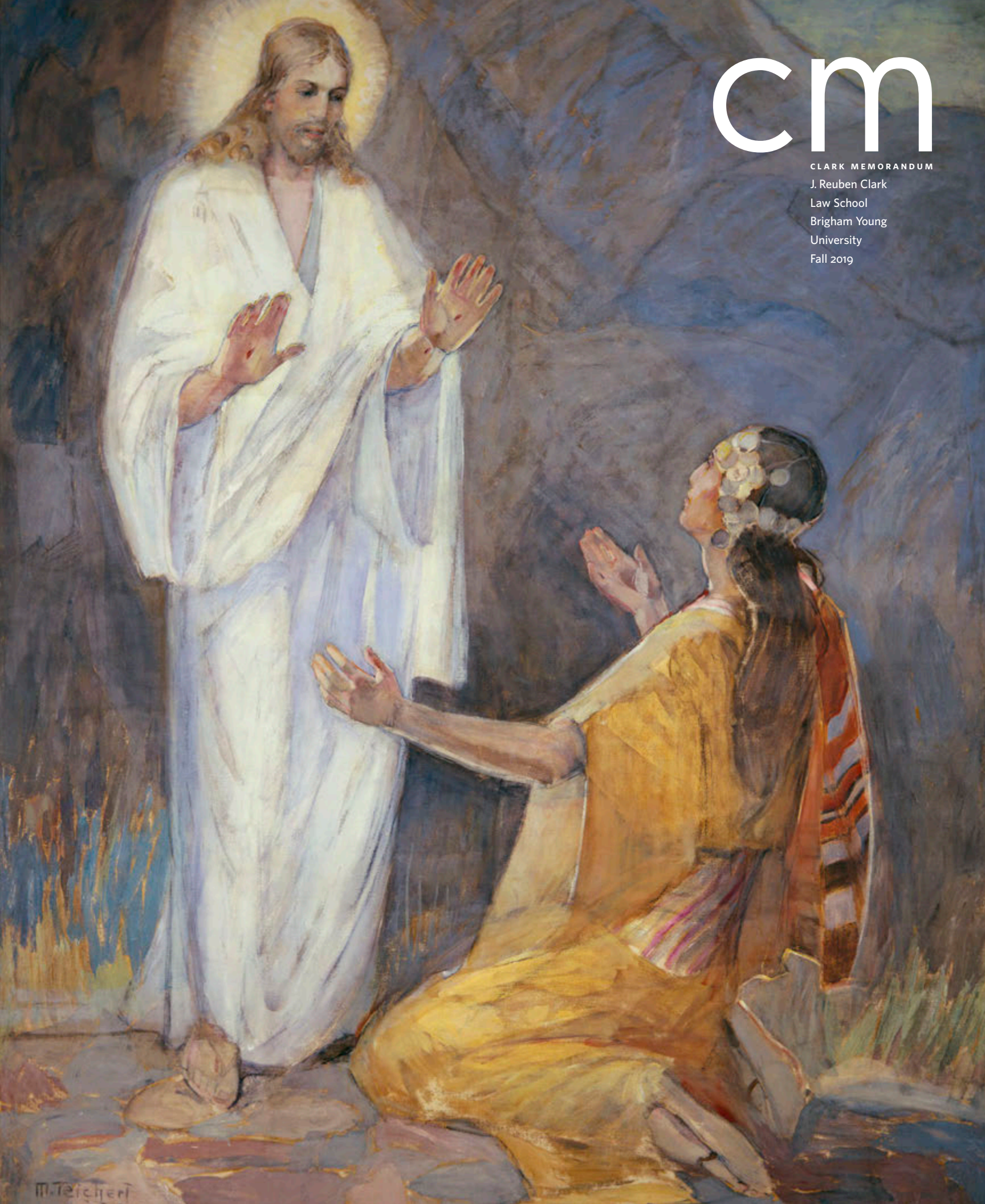
Fall 10-1-2019

Clark Memorandum: Fall 2019

J. Reuben Clark Law School

BYU Law School Alumni Association

J. Reuben Clark Law Society



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CLARK MEMORANDUM
J. Reuben Clark
Law School
Brigham Young
University
Fall 2019

COVER ART Minerva Teichert (1888–1976), *Touch Me Not*, 1937, oil on canvas, 76 1/2 x 59 3/4 inches. Brigham Young University Museum of Art.

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Amberly Page, EDITOR
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Bradley Slade, PHOTOGRAPHER

The *Clark Memorandum* is published by the J. Reuben Clark Law School at Brigham Young University, the BYU Law School Alumni Association, and the J. Reuben Clark Law Society.

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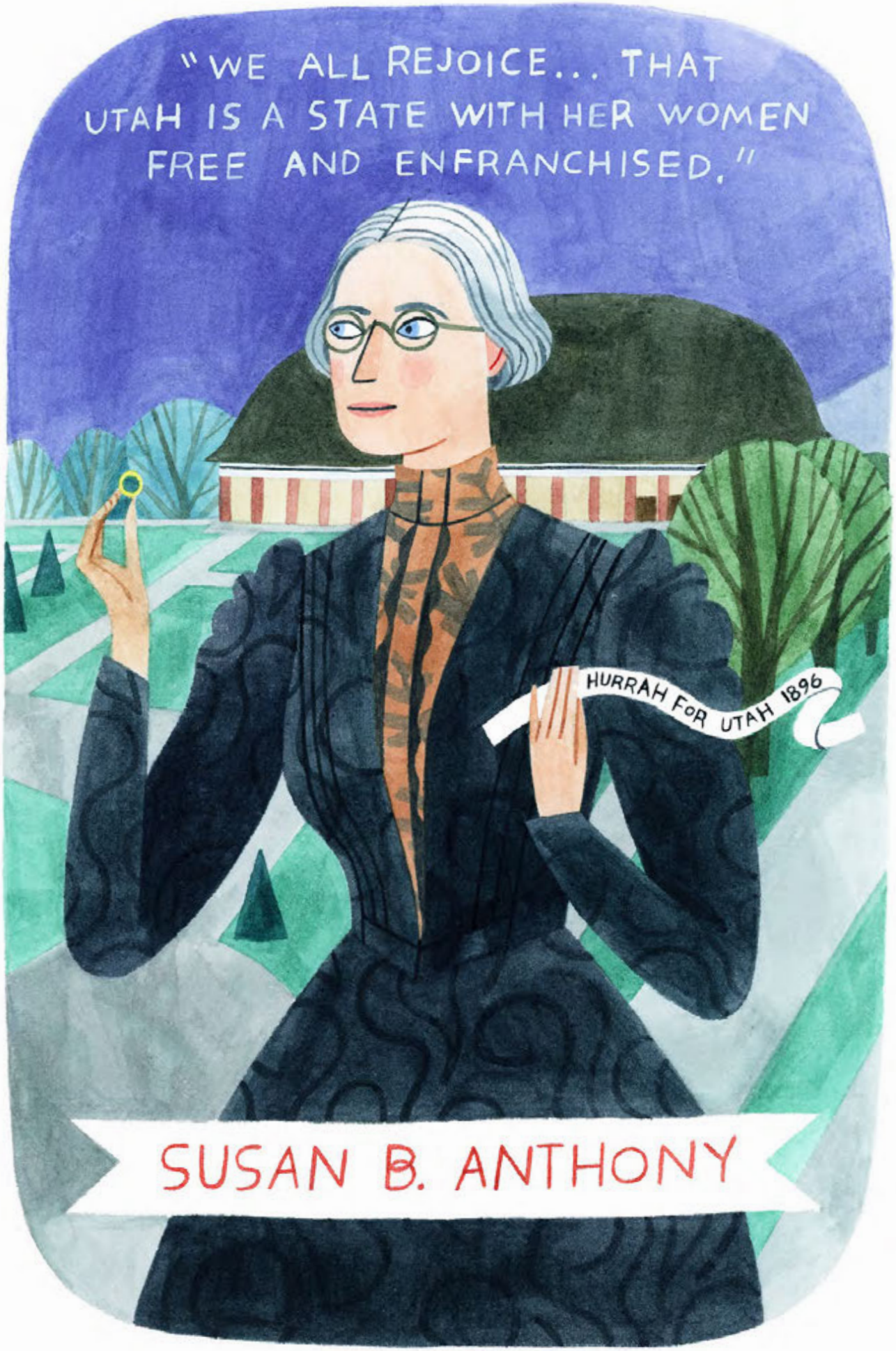

ILLUSTRATION BY BROOKE SMART

JOHN SNYDER

On a recent September morning I walked into the BYU Law building before most of our students and employees had arrived for the day. The sun was still nestled behind Y Mountain, but its muted morning light floated into the Fritz B. Burns Memorial Lounge. My eyes were drawn to the colorful art installation displaying a series of stunning photographs by renowned photographer Steve McCurry and celebrating the Law School's role in creating and promoting the Punta del Este Declaration on Human Dignity for Everyone Everywhere. The preamble to this declaration proclaims, "[E]qual human dignity of everyone everywhere is the foundational principle of human rights and reminds us that every person is of value and is worthy of respect."[1]

The notion that "every person is of value and is worthy of respect" resonates with us because we know that "the worth of souls is great in the sight of God" (D&C 18:10). Inspired by these ideas, we strive to create a law school that respects human difference. Indeed, we aspire to be a place where differences are welcomed. This aspiration of diversity and inclusion reflects an ancient understanding recognized by the Apostle Paul that difference is an inherent feature of community and that the gathering of diverse gifts elevates all members of the community. He wrote:

[J]ust as each of us has one body with many members, and these members do not all have the same function, so in Christ we, though many, form one body, and each member belongs to all the others. We have different gifts, according to the grace given to each of us. If your gift is . . . serving, then serve; if it is teaching, then teach; if it is to encourage, then give encouragement; if it is giving, then give generously; if it is to lead, do it diligently; if it is to show mercy, do it cheerfully. [Romans 12:4–8 (NIV)]

We desire to create a climate that encourages all members of the Law School community to "seek learning . . . by study and also by faith" (D&C 88:118). We recognize, however, that freedom of thought, belief, inquiry, and expression create the potential for conflict in a diverse community. In dealing with these conflicts, we echo the principles articulated by the Committee on Freedom of Expression at the University of Chicago, which proclaimed that "it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive."[2]

The Law School recently created another art installation that celebrates freedom of expression. In our library, we are displaying a series of illustrations by Utah artist Brooke Smart to commemorate the 150th anniversary of Utah women becoming the first American women to vote under an equal suffrage law and the 100th anniversary of the Nineteenth Amendment, which recognized the right to vote for all U.S. women. The courage of those who advocated for women's suffrage is an example to all of us who believe that the world can be changed for the better through law.

In the introduction to her book *Mr. President, How Long Must We Wait? Alice Paul, Woodrow Wilson, and the Fight for the Right to Vote*, Tina Cassidy reflected on similarities between the 1910s—the time just before the ratification of the Nineteenth Amendment—and our present day. This passage seems particularly relevant to the work of training leaders in law:

We fight the enemy abroad and battle each other at home. We hold sacred ideals but struggle to meet them ourselves. We forget that progress can be slow and sometimes indirect. But most of all, we fail to remember that it takes just one person—however imperfect—who is utterly committed to change, to make it happen.[3]

As we embark on a new academic year at the Law School, I invite you to join us in creating a community in which every person is of value and is worthy of respect. As we work together in this community, I sincerely believe that we can change the world for the better.

NOTES

1 The Punta del Este Declaration on Human Dignity for Everyone Everywhere: Seventy Years After the Universal Declaration of Human Rights, Punta del Este, Uruguay, December 2018, dignityforeveryone.org/wp-content/uploads/sites/5/2019/02/Punta-del-Este-Declaration.pdf.

2 Geoffrey R. Stone, Marianne Bertrand, Angela Olinto, Mark Siegler, David A. Strauss, Kenneth W. Warren, and Amanda Woodward, Report of the Committee on Freedom of Expression, University of Chicago, January 2015, p. 2.

3 Tina Cassidy, *Mr. President, How Long Must We Wait? Alice Paul, Woodrow Wilson, and the Fight for the Right to Vote* (New York: 37 Ink, 2019), xii.

D. GORDON SMITH

Dean, BYU Law School


IN ESSENTIALS,
UNITY;
IN NONESSENTIALS,
LIBERTY;
AND IN ALL THINGS,
CHARITY

BY ELDER JAMES R. RASBAND

General Authority Seventy, Former BYU Academic Vice President, and Former BYU Law School Dean

I am humbled to have this opportunity to speak this evening. I feel keenly how short I fall compared to the extraordinary group of women and men who have spoken at this fireside in the past, but I am nevertheless grateful to have this opportunity to share a few thoughts.

Forty-five years ago, on the first day of classes at the J. Reuben Clark Law School, then university president Dallin H. Oaks gave an address in which he articulated six expectations for the Law School. His fifth expectation related to "the curriculum and manner of instruction," which he said "should approach the law from a scholarly and objective point of view, with the largest latitude in the matters being considered." Then he remarked:

PHOTOGRAPHS BY BRADLEY SLADE

Yet despite the latitude that must be allowed for instruction in this law school, there are fundamental principles on which there is no latitude. *We expect to have a vigorous examination of the legal principles governing the relationship between church and state under the Constitution, but no time for debate over the existence of God or man's ultimate accountability to Him. There is ample latitude for examination of the responsibilities of a lawyer who is prosecuting or defending one of crime, but no room for debate over the wrongfulness of taking a life, stealing, or bearing false witness.*[1]

My effort in these remarks is to consider how we can distinguish interpretive questions on which we should give wide latitude and what President Oaks described as "fundamental principles on which there is no latitude." As President Oaks also noted:

[D]ifferent rules stand on different footings. There is no democracy among legal rules. Some are more important than others. Thus, some rules are based on eternal principles of right and wrong or on basic tenets of our Constitution. Others are rooted in the soil of men's reasoning, soil that may be washed away by the torrent of human custom or the current of advancing thought, leaving the rule without support or justification. . . .

In furtherance of their devotion to the rule of law the graduates of this law school [and, I will add parenthetically, all of the members of the J. Reuben Clark Law Society] should have minds sufficiently bright and consciences sufficiently sensitive to distinguish between rules grounded on morality and those grounded solely on precedent or tradition. Rules based on tradition may be assailed when their supporting reasons have lost touch with the soil of human need, but rules based on morality must be defended at all costs, since they are rooted in the eternal principles of right revealed by God our Father.[2]

This address was delivered at the J. Reuben Clark Law Society Annual Fireside on January 18, 2019, while Elder Rasband was serving as BYU *academic vice president.*

How, then, do we distinguish the rules that are essential—the rules that are fundamental and unalterable—from the rules "rooted in the soil of men's reasoning" that can "be washed away by the torrent of human custom or . . . advancing thought"? Discerning this line is no small moral task. I don't claim to discern this boundary with precision—and part of my point will be that we should be cautious in assuming we can—but I do claim that fundamental boundaries exist. More broadly, and equally fundamentally, I want to consider the principles that should guide our engagement with this line-drawing exercise.

THE ESSENTIALS AND ADIAPHORA

The effort to distinguish the essential from the nonessential is an age-old task. Stoic philosophers long ago divided human endeavor into three categories: good, evil, and *adiaphora*, which is a Greek term meaning "things indifferent."[3] During the Protestant Reformation, the

[r]eformers argued endlessly about what belonged in the category of adiaphora. *Was it essential or indifferent if the priest wore a surplice? If the Communion table was level with the congregation or elevated? If communicants knelt or stood for Communion? If worshippers sang hymns? . . . And so forth. Great debates raged about the boundaries of "adiaphora" in a properly reformed church.*[4]

I must confess that references to the Greek language when I don't know Greek or to the Stoics when I'm not a trained philosopher are a bit risky. As lawyers you likely share both my trepidation and my willingness to venture into areas where I have little formal training. It's the life of a litigator.

I was first introduced to the adiaphora terminology and idea years ago by John Tanner when we were serving together in the BYU administration and considering an application of BYU's academic freedom statement. John pointed out how often the scriptures use the language "it mattereth not"[5]—and as I will discuss later, in many, many cases that is surely true.

Although the precise debates that animated the reformers during the Protestant Reformation no longer generate such energy, there is still plenty of energy—some appropriate and some inappropriate—for engaging in the boundary-drawing exercise of distinguishing the essential from adiaphora, or things indifferent. In my judgment, grasping the nature of this challenge is a task for which lawyers, by their training, are particularly well equipped.

As a framework for considering the line between the essential and adiaphora, let's return to President Oaks's address on the first day of classes, when he said that "[w]e expect to have a vigorous examination of the legal principles governing the relationship between church and state under the Constitution, but no time for debate over the existence of God." Doctrinally, God's existence is not a matter for indifference. One cannot simultaneously claim both belief in the restored gospel and indifference about God's existence. Note, however, that belief in the existence of God *is* adiaphora if the test is national citizenship rather than membership in the restored Church of Jesus Christ. This distinction is conceptually important when we operate in both worlds but presents a challenging tension to which I will return.

What else can we confidently say is essential and not part of adiaphora for a believer? Immediately, we might add belief in the doctrine of the Savior's atoning sacrifice and the two great commandments set forth in the Savior's response to the lawyer's question:

> *Master, which is the great commandment in the law?*
> *Jesus said unto him, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind.*
> *This is the first and great commandment.*
> *And the second is like unto it, Thou shalt love thy neighbour as thyself.*
> *On these two commandments hang all the law and the prophets.*[6]

To take one more illustrative step, we could add the Ten Commandments to the essential list. We could continue this exercise all evening, identifying other doctrines and commandments and adding them to the essential core. As we add items to the core, however, at some point—and it would not be the same point for everyone in this room—we would hit issues on which we would disagree whether the teaching or practice was essential or adiaphora.[7]

To take a common example, consider Sabbath observance. We might all concur about the essential nature of the command in Exodus:

> *Remember the sabbath day, to keep it holy.*
> *Six days shalt thou labour, and do all thy work:*
> *But the seventh day is the sabbath of the Lord thy God: in it thou shalt not do any work.*[8]

But would we all agree on a list of permitted or prohibited Sabbath activities? How do we interpret the command to keep the Sabbath day "holy"? What does it mean that on the Sabbath day "thou shalt not do any work"? What about the ox in the mire? What about essential health and public services? And, to place this into the context of civil society, if we can discern the essentials of Sabbath observance, what, if any, part of those essentials is appropriate to demand of our fellow citizens? If we can settle upon the appropriate meaning and scope of Sabbath work, should our conclusion be imposed on fellow citizens in the form of blue laws?

This same interpretive challenge of discerning the boundaries of the essential and adiaphora emerges in the application of doctrine after doctrine. Even in the two great commandments, we are faced with the interpretive question of exactly how love of God and love of our neighbor should manifest themselves. Ask any parent or close friend about what love demands, and they will surely tell you of the struggle for discernment.

I hope it is clear that distinguishing the essential from adiaphora is not merely a theoretical exercise but instead the stuff of our everyday lives. If we struggle with a particular doctrine of the gospel, can we relegate that doctrine to adiaphora? How much room for disagreement is there? Is separating adiaphora from the essential just a matter of personal

"RULES BASED ON TRADITION MAY BE ASSAILED WHEN THEIR SUPPORTING REASONS HAVE LOST TOUCH WITH THE SOIL OF HUMAN NEED, BUT RULES BASED ON MORALITY MUST BE DEFENDED AT ALL COSTS."

—DALLIN H. OAKS

preference, or is there a real line to be discerned? I am committed to the principle that there are, in fact, real lines to be discerned—I've mentioned just a few of them already. But my project isn't to draw all those lines; instead, I'd like to consider some principles by which we can approach this discernment challenge.

PRINCIPLES, APPLICATION, AND FENCES

I discuss a familiar but important idea: distinguishing the essential from adiaphora is partly about distinguishing principle from application. Here again, the law of the Sabbath is an instructive example. And to be clear, my primary concern is not the Sabbath. Rather, my sense is that the familiarity of Sabbath boundary questions will help illustrate the conceptual framework that I hope we can then apply to challenging doctrinal, political, and social policy boundary questions that weigh on each of us.

President Russell M. Nelson taught about Sabbath day observance in a conference talk a few years ago:

In my much younger years, I studied the work of others who had compiled lists of things to do and things not *to do on the Sabbath. It wasn't until later that I learned from the scriptures that my conduct and my attitude on the Sabbath constituted a* sign *between me and my Heavenly Father. With that understanding, I no longer needed lists of dos and don'ts. When I had to make a decision whether or not an activity was appropriate for the Sabbath, I simply asked myself, "What* sign *do I want to give to God?" That question made my choices about the Sabbath day crystal clear.*[9]

Not only for Sabbath day observance but for any commandment, it is simply impossible to list all the potential applications. The value of focusing on principles is that, once internalized, the principle allows us to adapt to a wide range of questions and challenges. Principles have staying power, whereas applications can, in President Oaks's words, lose "touch with the soil of human need."[10]

Although I fear it is disciplinary arrogance, I believe legal training equips us well to perceive the difference between principles and application. Starting in the first year of law school, there is a relentless focus on thinking about core theories and considering different hypotheticals that apply those theories. Take, for example, the study of tort law. The goal is not to turn everyone into expert personal injury lawyers. Rather the goal is to have students think about concepts such as unreasonable risk, causation, and the scope of an individual's responsibility in society. Similarly, the purpose of a first-year property law course is not to make sure students can write up a mortgage or lease but to have them think about the nature of ownership. What makes something property? What limits can society place on our use of property? And in a first-year contracts course, the goal is not primarily to teach students how to write contracts but to have them think about why some agreements are binding but others might not be, why it matters when someone takes action in reliance on the promise of another, and so forth.

In his address on the first day of classes at BYU Law, President Oaks emphasized that the best legal training focuses on theory and principle:

The half-life of a legal concept, even in these changing times, is measured in centuries, not academic years. As legal historians can testify, many of the important problems and controversies of our day are just re-creations under different labels of problems encountered by successive generations for centuries into the past. A legal training that is predominantly theoretical is best able to equip students with the principles and skills they can apply throughout shifting circumstances of the next half-century.[11]

Thus, the goal of much of the study of law is not primarily to create specific expertise but to teach principles that will allow students to handle the multitude of different challenges that

will emerge in the practice of law or simply in the course of life. And, of course, one of those challenges is distinguishing principle from application and the essential from adiaphora.

This is not to say that all application is adiaphora. Think about the Word of Wisdom. The crucial *principle* is that our body is a temple—and understanding that principle can answer so many questions about how we treat our body—but we still do have some *applications* (alcohol, tea, coffee) that are not matters of indifference, or adiaphora.

When one listens to the leaders of The Church of Jesus Christ of Latter-day Saints, it is not surprising that their talks focus primarily on principles rather than applications. Their focus is on the essential. This focus on teaching essential principles rather than applications has some other salient benefits. It is a powerful symbol of trust.[12] It allows us not to be commanded in all things but to instead be anxiously engaged in good causes by our own free will and choice.[13] Teaching principles also promotes the exercise of moral agency: we are free to act for ourselves in applying the essential principle to particular situations.

If we are trying to discern the boundary between the essential and adiaphora, focusing on principles seems the wise course. We often teach this in the negative by pointing to the Sabbath practices of the scribes and the Pharisees at the time of Christ. Recall how the scribes and the Pharisees famously constructed fences around the Mosaic law. To ensure that the command not to work on the Sabbath was followed, for example, various detailed categories of work were defined, including how many steps one could take, how many letters could be written, and so on. The Savior famously condemned this approach by healing the sick and plucking and eating heads of grain on the Sabbath, and He taught that "[t]he sabbath was made for man, and not man for the sabbath."[14]

Still, we may be too quick in our criticism of the scribes and Pharisees for their fence building. It can be wisdom to build personal fences around commandments we wish to keep. Walking to the edge of danger is rarely wise. The Savior Himself proposed fences with respect to the commandment against murder, enjoining that "whosoever is angry with his brother without a cause shall be in danger of the judgment," and with respect to adultery, forbidding looking "on a woman to lust after her."[15]

In our own efforts to live what is essential, we may construct protective fences. In doing so, however, we need to be mindful that our fence is not the equivalent of the underlying principle or law, and thus we should not insist that others build their barricades in precisely the same place. This was the real error of the scribes and the Pharisees.

It can be so tempting to assume that the boundary between the essential and adiaphora is universal: that which we regard as essential is essential for everyone else, and that which we regard as a matter of indifference must be a matter of indifference for all. Here the admonitions to "judge not"[16] and "to love mercy, and to walk humbly with thy God"[17] seem particularly critical. If our neighbor's application of a commandment is different than our application, it is not a cause for judgment. This is not to say that any behavioral choice is an acceptable application of the underlying principle. The key concept is one of accountability. We are surely accountable for our own demarcation between the essential and adiaphora. And that should be enough to occupy our full attention.

Understanding that application choices are statements of personal accountability teaches a related point. Because in discerning the boundary between the essential and adiaphora, we often want to enlist others to our cause. If only the prophet or another leader would just give a talk affirming our preferred application of a doctrinal principle. Stated another way, we want our choices to be affirmed as being on the "do list" rather than on the "do not list." This sort of capture the leader—or sometimes just capture the preferred talk—is a temptation for all of us (and I've certainly participated), but ultimately we are still accountable to the Lord for the boundary we draw and the application of the principle we pursue. Insisting that our demarcation of adiaphora be publicly affirmed is, in a sense, a request that the application of others be condemned. How much better for all of us to charitably understand and humbly consider when others apply a principle differently and to instead focus on our own accountability.[18]

IN OUR OWN EFFORTS TO LIVE WHAT IS ESSENTIAL, WE MAY CONSTRUCT PROTECTIVE FENCES. IN DOING SO, HOWEVER, WE NEED TO BE MINDFUL THAT OUR FENCE IS NOT THE EQUIVALENT OF THE UNDERLYING PRINCIPLE OR LAW, AND THUS WE SHOULD NOT INSIST THAT OTHERS BUILD THEIR BARRICADES IN PRECISELY THE SAME PLACE.


ESSENTIAL
ADIAPHORA

THE VANISHING ESSENTIAL

Another approach we sometimes employ to avoid hard questions about the boundary between the essential and adiaphora is to reduce the size of the essential so that almost all doctrine, principle, and policy are a matter of indifference. Recall my earlier effort to set forth just a few core doctrines that could be categorized as essential—the existence of God; the Savior's atoning sacrifice; the two great commandments to love God with "all thy heart, and with all thy soul, and with all thy mind" and to "love thy neighbour as thyself."[19] Visually, one can imagine a vast outer circle representing adiaphora and then, at the center, four inner, concentric circles identifying these essentials. As I suggested earlier, additional essential doctrines could be added to expand the interior concentric circles—the covenants we make with our Heavenly Father are one example.

What happens, though, when an essential principle or doctrine may not align with one of our political or policy preferences? One temptation is to ignore this possibility and uncritically assume that our preferences align perfectly with the essential. Another risk is that we will simply reduce the area of what is essential until our preference sits comfortably outside the essential circle and within the broader boundary of adiaphora. An example of this might be the idea that the only essential truth is God's love and that everything else is adiaphora. This has some appeal because God's love for us—and the two great commandments that we love Him and love our neighbor—is indeed an essential baseline principle from which so many important and faithful applications can be derived.

The risk, however, is that if love is the one essential, the other commandments can be relegated as adiaphora. Yet the Savior was clear that on the two great commandments "hang all the law and the prophets."[20] He also said, "If ye love me, keep my commandments."[21] Thus, the Savior invested the principle of love with essential subsidiary principles and applications. This makes sense because the commandments

themselves are a manifestation of God's love in the form of information about how to live joyfully.[22]

What is critical, I think, is to not relegate the commandments to adiaphora. If the commandments are matters of indifference, then the Savior's atoning sacrifice is irrelevant; mercy would not need to satisfy the demands of justice.[23] It would be no small irony if Christ's teachings about love were understood to vitiate His greatest act of love—His sacrifice to atone for our sins—on the assumption that He unnecessarily paid a price that justice did not require.[24]

IN ALL THINGS, CHARITY

Discerning the precise boundaries of the essential and adiaphora is a lifetime project. Indeed, I am quite confident we won't discern its full boundaries during our lifetime, for as Paul said:

> *For now we see through a glass, darkly; but then face to face: now I know in part; but then shall I know even as also I am known.*
>
> *And now abideth faith, hope, charity, these three; but the greatest of these is charity*.[25]

If we can't discern the boundary precisely, I hope I have been clear that there are indeed essential, eternal truths discernible to those who seek them. Indeed, the most precious truths are most fully known by the Spirit. But even if the essential is most perceptively discerned

by the Spirit, I hope also that I have hit upon a few useful principles to guide our effort to study out in our minds the boundary between the essential and adiaphora.

Drawing boundaries is such an important function of our exercise of agency, and the effort can be so challenging; even when we properly discern what is essential, we fail to consistently live in accordance with the truths we know. Paul's admonition to charity is critical. I tried to capture this idea in the title of my remarks tonight—"In Essentials, Unity; in Nonessentials, Liberty; and in All Things, Charity." This language is found in BYU's Academic Freedom Policy,[26] which is the context in which John Tanner first introduced me to adiaphora.

The policy makes what I believe is a noble effort to give notice in concrete terms of the boundary between the essential and adiaphora, at least for the academic project of faculty at BYU. As it must, the document describes the boundaries with reference to principles rather than precise applications, concluding that a limit on individual faculty academic freedom "is reasonable when the faculty behavior or expression *seriously and adversely* affects the University mission or the Church." The document provides three examples, including "expression with students or in public that contradicts or opposes, rather than analyzes or discusses, fundamental Church doctrine or policy." No finding of a violation is appropriate "unless [a] faculty member can fairly be considered aware that the expression violates the standards."[27]

As one of the persons charged with applying this principle, I can tell you that it is a humbling and daunting role. Fortunately, the occasions when we need to engage in this boundary analysis are truly rare. But when we do, the Academic Freedom Policy counsels:

> *The faculty, administration, and the Board should work together in a spirit of love, trust, and goodwill. The faculty rightly assumes its work is presumptively free from restraint, but at the same time it assumes an obligation of dealing with sensitive issues sensitively and with a civility that becomes believers. BYU rightly expects LDS faculty to be faithful to, and other faculty to be respectful of, the Church and BYU's mission. Thus both the University's governing bodies and the faculty obligate themselves to use their respective academic freedom responsibly, within the context of a commitment to the gospel. As Elder B. H. Roberts said, "In essentials let there be unity; in nonessentials, liberty; and in all things, charity."*[28]

This posture seems exactly right for BYU, and it articulates a principle that applies well beyond academic confines. I join in the hope that in essentials we will find unity and in nonessentials, liberty. But because the essential and the nonessential adiaphora can be challenging to discern—particularly at the margins and with those whose values or faith differ from our own—I hope that in all instances we will exhibit charity. In the name of Jesus Christ, amen. cm

NOTES

1 Dallin H. Oaks, in *Addresses at the Ceremony Opening the J. Reuben Clark Law School*, August 27, 1973, 12–13; emphasis added.

2 Oaks, in *Addresses*, 9–10.

3 John S. Tanner, *Notes from an Amateur: A Disciple's Life in the Academy* (Provo: BYU Religious Studies Center; Salt Lake City: Deseret Book, 2011), 63; see also pages 62–64.

4 Tanner, *Notes from an Amateur*, 63.

5 Tanner, *Notes from an Amateur*, 62.

6 Matthew 22:36–40.

7 Recall that the Stoics divided the world into three categories—good, evil, and adiaphora, or the indifferent. Here, and elsewhere in my remarks, I have treated "the essential" as including both commands to do good and commands to avoid evil. For most of the questions I address, this dual framework has conceptual utility, but there are instances in which the tripartite framework of the Stoics could provide additional conceptual clarity.

8 Exodus 20:8–10.

9 Russell M. Nelson, "The Sabbath Is a Delight," *Ensign*, May 2015.

10 Oaks, *Addresses*, 10.

11 Oaks, *Addresses*, 13.

12 See Tad R. Callister, "The Power of Principles," *Religious Educator* 19, no. 2 (2018): 4–5.

13 See Doctrine and Covenants 58:27.

14 Mark 2:27; see also Mark 2:23–28; Matthew 12:1–8; Luke 6:1–5; Luke 13:10–17.

15 Matthew 5:21–28.

16 Matthew 7:1.

17 Micah 6:8.

18 This may be partly why priesthood leaders are counseled not to add to the questions in the temple recommend interview. The interview is primarily a chance for each of us to hold ourselves accountable before the Lord with respect to how we understand the questions. Again, this is not to say that the questions can mean whatever we say they mean; priesthood leaders are not foreclosed from following up as led by the Spirit. But the essence of the interview is our own statement of accountability to principles of chastity, honesty, charitable family relationships, covenant keeping, and so on.

19 Matthew 22:37–39.

20 Matthew 22:40.

21 John 14:15.

22 See John 8:32–34; Doctrine and Covenants 59:4.

23 See Alma 34:14–16.

24 The claim that the only essential truth is that God is love does not necessarily mean that all else is adiaphora, thereby rendering the Atonement unnecessary. One can, for example, derive some set of essential applications from the core principle that God is love and then conclude that disobedience to these derived applications requires redemption by the Savior's atoning sacrifice. The risk of abstracting to a single principle of love and then rederiving essential applications is that those applications may not align with the core applications—in the form of commandments and doctrines—that the Savior Himself taught.

25 1 Corinthians 13:12–13.

26 Academic Freedom Policy, Brigham Young University (April 1, 1993), policy.byu.edu/view/index.php?p=9; quoting B. H. Roberts, in Conference Report, October 1912, 30. The source of Roberts's citation is the Latin maxim "*In necessariis unitas, in non-necessariis (or, dubiis) libertas, in utrisque (or, omnibus) caritas*" (see Philip Schaff, *History of the Christian Church*, 2nd ed. (New York: Charles Scribner's Sons, 1915), 6:650).

27 Academic Freedom Policy; emphasis in original.

28 Academic Freedom Policy.

Michalyn Steele

BYU PROFESSOR OF LAW

CHOOSE TO TRUST THE LORD

*M*y dear brothers and sisters, I am honored to speak to you today and to share my witness of the Savior and the good news of the gospel. I want to acknowledge that we are gathered in this valley that is the traditional homeland of indigenous peoples called today the Utes, the Paiutes, and the Shoshone nations, among others. I honor their resilience, and I am thankful for their preservation as peoples.


IN MEMORY OF OUR GOD
AND RELIGION AND
OUR
CHILDREN

I believe that the Lord has preserved many essential truths by preserving the indigenous peoples and their cultures. Just as Joseph of old stored up grain against the time of famine to save the house of Israel, and just as the record of Lehi and his children was preserved against a time of spiritual famine, indigenous peoples and cultures hold truths to teach us in this age of political, moral, and ecological turbulence.

I am a member of the Seneca Nation of Indians from New York. I grew up in a small branch of The Church of Jesus Christ of Latter-day Saints on the Cattaraugus Reservation. I am grateful for my inheritance as a Seneca, as well as for the strength of my pioneer ancestors. I receive many blessings that come to me through those who chose the path of discipleship. I acknowledge with gratitude those who came before, who showed the way, who prepared the ground for my faith to flourish, and who opened the doors for the opportunities that have been mine.

Similarly, I acknowledge that this campus is sacred ground. It has been set apart—consecrated—for our learning "by study and also by faith."[1] In that spirit, I hope to share a message with you that might help you navigate the difficult days ahead and the many trials of your faith that will come as your lives unfold. We will each face the trials inherent to mortality—trials of physical frailty, mental illness, heartbreak, loss, political turmoil, and rampant injustice—and spiritual trials that will surely test our commitment to the Savior and His kingdom.

College is a time of tremendous growth, both intellectually and spiritually. We develop critical thinking skills and take in so much information. We wrestle before the Lord to develop and deepen our testimonies and flesh out our identities. In this age of abundant information and disinformation, how do we know where to turn as we refine our beliefs and mature our testimonies? And how do we respond as our faith passes through refining fires?

My message to you today is that, whatever your trials—mortal or spiritual—you can choose to trust in the Lord. While so much around you is inconstant and fleeting, He is faithful. He will never fail you. You may rely on His love as an unerring truth.

In the Midst of Fiery Trials

In difficult times, you may find yourself asking, as this hymn does:

Where can I turn for peace?
Where is my solace
When other sources cease to make me whole? . . .

Where, when my aching grows,
Where, when I languish,
Where, in my need to know, where can I run?
Where is the quiet hand to calm my anguish?
Who, who can understand?
He, only One.[2]

My life experiences have taught me the truth of the hymn's answer. The Lord is there to understand and to quiet our anguish. At many points I have seen the Lord's hand moving miraculously to order and bless the circumstances of my life. He has prepared a path, opened doors, raised up friends, and multiplied joys in my life. I have seen how these blessings have been tailored specifically for me and fitted to my particular needs. Many blessings were set in motion long before my needs arose. So too has the adversary tailored opposition and trials to fit my weakness.

There have also been times when I have longed for the Lord's intervention in specific ways, when I have petitioned and pleaded with the Lord for blessings that have not been realized. There have been questions that have gone unanswered and times when the heavens felt silent. In those moments the adversary has tried to whisper that no one has heard my prayers. I have prayed and fasted for many years that the promise of my patriarchal blessing and other priesthood blessings—that I would find a true companion and be a mother—might be fulfilled. Those blessings have not been realized for me on my preferred timeline, despite my most fervent petitioning. But it has not been because no one heard them. That was a lie from the adversary. My Father in Heaven has heard and answered every prayer, even when the answers have been difficult for me.

Of course I have had a rich, happy, and fulfilling life. The Lord has poured out abundant blessings—meted out with the "good measure" of the Lord, "pressed down" and "running over"[3]—far beyond my merits. But my life has not looked like the life I would have sought for myself.

In coping with the Lord's counsel to wait or to do without, I have had to learn to choose to trust the Lord. I have had to choose to let these experiences refine and deepen my faith rather than yield to the temptation to despair in the Lord and abandon my hope and faith.

Everyone passes "through fiery trials."[4] I know that many of you, though you may be

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JUST AS THE RECORD OF LEHI AND HIS CHILDREN WAS PRESERVED AGAINST A TIME OF SPIRITUAL FAMINE, INDIGENOUS PEOPLES AND CULTURES HOLD TRUTHS TO TEACH US IN THIS AGE OF POLITICAL, MORAL, AND ECOLOGICAL TURBULENCE.

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young, are like the Savior, acquainted with grief. Many of you may be weighed down with your own sorrows, challenges, or disappointments. Some of you may be wrestling through questions concerning your faith. I know that the Savior is intimately acquainted with your grief and sees your sorrows. He has promised one day to wipe away all tears. And He will. But, in the meantime, during those moments of fiery trial, how do we choose to trust in the Lord—especially when we may, for a time, feel alone?

I hope that some of the lessons I am learning might be of some comfort to you now or in future times of need.

Like the blessings I have received, the challenges I have faced have been individualized, tailor-made to cultivate my strengths and to fortify my weaknesses. In walking my path, I have been given the opportunity to choose to love and obey the Lord, even when I have felt sometimes forsaken. I am learning that my faith in the Lord is not conditioned on getting what I want when I want it. Instead, I have worked to develop trust and love for the Lord that is not transactional but relational. I love Him for who He is. I trust Him and His love for me. He is my Creator and Savior.

I offer three principles that have helped me choose to trust the Lord in times of trial. I offer these principles humbly—knowing that you walk a path tailored for you—but also confidently, trusting in the constancy of the Lord.

PRINCIPLE NUMBER 1
The Seven Generations Principle

First, I offer one lesson from the Seneca tradition. It is an idea found in many indigenous cultures in some form. It is called the seven generations principle.[5] The seven generations principle in the Seneca culture means that we are obliged to consider the consequences and outcomes of our choices on the next seven generations. It is a cultural value that entrenches the practice of taking the long view where possible and acting in the interest of the long term rather than the short term. The seven generations principle challenges us to pause and contemplate how our choices, when multiplied and amplified through future generations, might affect our relationships with the Creator, with one another, and with the earth.

This principle means that we strive to keep an eye on the things of eternity, even—perhaps especially—in the midst of blinding mortal pain. How do we maintain that long view and choose to trust the Lord when the pain of our physical or spiritual trial is so acute and present, when the suffering is sore and stubborn?

When I say to keep an eye on the eternal in the midst of mortal pain, I mean that we should seek to keep our spiritual gaze fixed on the great eternal sacrifice, the infinite Atonement of Jesus Christ. The adversary seeks to distract us by fixing our focus entirely on our temporal pain and by tempting us to dwell on perceived slights and injustices, obscuring the Lord's love. This is one reason it is imperative that we partake of the sacrament each week, renewing our covenant to "always remember"[6] the Savior.

This address was delivered as a BYU devotional on June 25, 2019.

Just as He suffered, we will suffer as part of the mortal experience. In choosing to trust the Lord, we can consecrate our suffering to a greater understanding of His suffering and allow it to build in us a deeper capacity for compassion and mercy toward the suffering of others. Though He was perfect, He made Himself an offering of mercy to satisfy justice. Having drunk from that bitter cup, He knows how to succor and comfort us in our infirmities if we trust Him.

As Alma taught his son Helaman, "I do know that whosoever shall put their trust in God shall be supported in their trials, and their troubles, and their afflictions, and shall be lifted up at the last day."[7] Putting our trust in God does not spare us from trials, troubles, or affliction. Instead, God has promised to support us while we are *in* those mortal difficulties. Elder Neal A. Maxwell taught of our trials, "Rather than simply passing through these things, they must pass through us and do so in ways which sanctify these experiences for our good."[8] By taking the long view, as the Seneca culture counsels, and choosing to trust the Lord and His eternal timeline, we can pass through our trials and let the trials pass through us as we deepen—not abandon—our faith and our kindness.

PRINCIPLE NUMBER 2
"Seek Not to Counsel the Lord"

In addition to the seven generations principle of taking the long view, might I suggest a second principle that seems especially relevant to the successful navigation of our trials. I take this principle from Jacob's plea to the wavering Nephites. He urged, "Seek not to counsel the Lord, but to take counsel from his hand."[9]

If you are like me, you are full of great ideas, hopes, and dreams about how your lives ought to go: the timing of change and the fulfillment of blessings, jobs or other experiences we might enjoy, or opportunities that we think would be a good fit and would help us to be happy. Indeed, we are commanded to ask the Lord for the desires of our hearts. With faith—and with fasting, when appropriate—we should plead with and petition the Lord for the experiences we desire.

That is a very different thing than seeking to counsel the Lord or resisting His counsel.

Seeking to counsel the Lord means to me that we adjudge our wisdom and preferences to be superior to the Lord's. That reflects a fundamental lack of trust in His omniscience, in His omnipotence, and, more important, in His perfect love. We

might suppose that if we could only persuade the Lord to do things our way, life would be much improved. We may feel frustrated by what we deem His resistance to our counsel on such matters.

Although I am now a law professor, in my heart of hearts and by experience and inclination, I am a civil rights lawyer. I loved working as an attorney enforcing the federal civil rights laws at the United States Department of Justice. I feel passionately about the rule of law and the pursuit of justice. I believe in the equal dignity of all God's children. I mourn with those who mourn about the deep injustice that falls so disproportionately on people of color, on religious minorities, on our LGBTQ+ brothers and sisters, on immigrants and refugees, and on others. I believe my love for the equal dignity of all God's children is one of the spiritual gifts He has given me. But as much as I may love and seek after justice, I do not have anything to teach the Lord about justice. He does not need my counsel as an advocate about how to bless and provide for His children or about how to order His kingdom. He sees the end from the beginning, "and there is not anything save he knows it."[10]

One title for an attorney is "counselor." It is a title I have held in various settings. In my roles as an attorney and as a law professor, I offer counsel to others that draws upon my study and professional judgment. It is meant to guide and protect those I serve. With the credentials of my education and experiences comes trust. Some attorneys earn thousands of dollars an hour for their counsel. (Not me, by the way. Despite how expensive law school feels to law students, I would much rather be here with you.) But as attorneys, we come to think that our counsel has tremendous value to help resolve problems and address challenges. And it can. This is true for all professionals.

You too, as educated individuals, are earning credentials and having experiences that are shaping and informing your judgment. Those credentials will give weight and amplification to your views in society and will add value to resolving the many varied problems—personal and professional—that you will face. Those of us who have responsibilities for your education are eager for you to develop sound critical thinking skills and judgment.

Whatever your field of study, I have no doubt that you will contribute your learning and good judgment to the inevitable and daunting challenges of your families, your employers, your communities, and your congregations. But no matter how learned we may become in whatever field, and no matter the earthly value of our counsel, we will never have knowledge or judgment that will exceed the Lord's. That is why we should not seek to counsel the Lord but should seek to take counsel from His hand.

Jacob warned against seeking to counsel the Lord because of what he called the "cunning plan of the evil one"[11] specifically targeting those of us who have opportunities for learning. Jacob lamented:

O the vainness, and the frailties, and the foolishness of men! When they are learned they think they are wise, and they hearken not unto the counsel of God, for they set it aside, supposing they know of themselves, wherefore, their wisdom is foolishness and it profiteth them not. And they shall perish.

But to be learned is good if they hearken unto the counsels of God.[12]

We must not allow the great gift and blessing of our learning and education to divide us from His wisdom. Instead, we must let our learning deepen our trust in Him and multiply the gifts we have to offer to Him and His children. I have learned that He does not need to be persuaded to do good things or advised about "how to give good gifts unto [His] children."[13] While there are many settings in which He will draw upon our good judgment and learning to bless lives, we must remember that He does not need the best thinking of the wisest and brightest among us to augment His understanding. He already has all wisdom and all judgment.

I will add here a warning about another great temptation that we must guard against as those with the blessings of advanced education. Nephite society, including the Church, was stratified and destroyed because "there became a great inequality in all the land."[14] What caused the inequality? In part it was because "the people began to be distinguished by ranks, according to their riches and their chances for learning."[15] The people who had money or who had "chances for learning" looked down on those who did not. Let us never misappropriate the blessing of our education as a cause to vaunt our knowledge over those who have not had the same opportunities we have had—and certainly not as a reason to vaunt our wisdom over the Lord's. Rather, let us humbly consecrate our gifts to the Lord. Let us serve and love His children, no matter their circumstances and even when we do not understand the Lord's purposes.

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IN CHOOSING TO TRUST THE LORD, WE CAN CONSECRATE OUR SUFFERING TO A GREATER UNDERSTANDING OF HIS SUFFERING AND ALLOW IT TO BUILD IN US A DEEPER CAPACITY FOR COMPASSION AND MERCY TOWARD THE SUFFERING OF OTHERS.

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A long time ago, I was called as a missionary to the Texas Houston Mission. The call said that I should report to the MTC to prepare to teach the gospel in the English language. As my stake president set me apart as a missionary, I remember him saying these words: "The language the Lord would like you to learn is the language of the Spirit."

I knew that to learn the vocabulary and grammar of the language of the Spirit, I would need to study the scriptures, identify promptings, and understand the whisperings of the Holy Ghost. I knew that it was

a language I had been learning my whole life as my parents taught me to keep the commandments and to love the Lord. I had mentors and teachers who had modeled fluency in the language of the Spirit. "To take counsel from [the Lord's] hand,"[16] as Jacob instructed, we must develop our own fluency in the language of the Spirit. To try to learn that language, I undertook a deep study of the Book of Mormon.

Once I had arrived at the MTC, I enjoyed learning the principles of missionary work, but I kept wondering how I might say certain phrases in Spanish. When that happened, I told myself to keep focused on the tasks at hand. But my mind kept wandering to the few Spanish phrases I knew, and I kept wondering about Spanish grammar and vocabulary.

I eventually recognized that these unbidden thoughts were the whisperings of the Spirit helping to prepare me to go to Houston, Texas, where there would be many people I would meet who would speak Spanish. So I went to the MTC bookstore and bought a copy of El Libro de Mormón and put it with my things, pleased that I had felt and recognized a prompting and sure that I would have the opportunity to share that book with someone as a missionary.

When I arrived in Houston a few weeks later, my mission president, Clark T. Thorstenson, pulled me aside at the airport. He said, "Sister Steele, the Lord has made it clear to me that He would like you to learn Spanish. I am assigning you to the Spanish-speaking program."

I felt like the Lord had been trying to whisper it to me all along and was smiling, now that I was in on the plan too. That evening I wondered how I would ever learn Spanish, and I wished that I could go back to the MTC. Then I remembered my Libro de Mormón. I took it out and began to read. My study of the Book of Mormon in preparing for my mission helped me to follow along: "Yo, Nefi, nací de buenos padres."[17] *Buenos padres*? "Goodly parents"![18]

At first I had no other books to use to study the Spanish language except for the Book of Mormon. But I remembered the inspired counsel of my stake president: the language the Lord wanted me to learn was the language of the Spirit. I enlisted the Spirit—who, it turns out, speaks perfect Spanish—to magnify my abilities and to tutor me in both the Spanish language and the language of the Spirit. Those two languages would be crucial to my missionary service.

A few months in, I had a companion from El Salvador, Hermana Seravia. She was a great missionary and senior companion. One day she said to me, "Hermana, you are doing pretty good with Spanish, but you talk too much like a Book of Mormon! We don't really say, 'Now behold, we rejoice to be in your home.'"

I have reflected a lot in the years since this experience about the way that calling unfolded. I know that the Lord is omniscient. Surely He knew that the people I was called to teach in Houston spoke Spanish and that I did not know Spanish when my call had been issued months earlier.

So why did the Lord send me to Texas without MTC language training? At the time, if I were to have designed the experience for myself, I would have called me to learn Spanish in the MTC. However, although I have the power of choice and autonomy in many things, I am not the primary architect of my own life experiences. I am called to trust that the Lord has a plan for my life, just as I know that He has a plan for yours. Both the big picture and the smaller details are within His infinite and loving calculus.

As it worked out, the experience was tailored to draw upon my particular strengths and to fortify my particular weaknesses. The airport switcheroo meant that I could not lean upon my own capacities to learn Spanish as a purely intellectual exercise. I had to rely on the gifts and tutelage of the Spirit. I had to plead for the gift of tongues. I had to rely on the prayers of loved ones—the power of which I could feel bringing words and phrases to my mind and loosing my tongue as I taught. The Lord foresaw that Spanish would be a great blessing in my life but that learning to trust Him and rely on Him while learning the language of the Spirit was an even more important lesson.

Sometimes we are asked to submit to ongoing ambiguity or to a grueling lesson we would prefer not to learn. Such moments provide us with the opportunity to realize one of the purposes of our mortal experience: to choose to trust Him to bless us with the experiences that we need rather than the experiences we might want.

As we put our trust in the Lord and lean not on our own limited understanding of eternal things, the individualized path He has designed for each of His children will unfold. It is marvelous to contemplate that although He is the great God of the universe and the works of His hands are beyond our numbering, each of us is known and loved by Him. Indeed, we are "graven . . . upon the palms of [His] hands."[19] To fulfill God's purposes for our lives, we must learn to trust in His love and goodness, even in times when we feel alone—just as Jesus felt alone. It does not mean that we do not keenly feel the full weight of the pain of our trials—just as Jesus felt His mortal pain.

The Savior felt the hunger, thirst, fatigue, rejection, grief, pain, and loneliness of His mortal experiences. He even asked that the unimaginable weight of His burden of sorrow and pain be removed, if possible. Matthew recorded that in the Garden of Gethsemane, Jesus told His disciples, "My soul is exceeding sorrowful, even unto death."[20] The scripture tells us that so great was His suffering that "he went a little further, and fell on his face, and prayed, saying, O my Father, if it be possible, let this cup pass from me: nevertheless not as I will, but as thou wilt."[21]

The experience of Jesus in Gethsemane teaches me that it is not a sin to desire that we be spared some experiences or to ask that burdens be removed. The pain of those crossroads, in which our will and the Father's will diverge, is profound. Nevertheless, Jesus modeled how such moments are best resolved: choosing, because of our love for the Father, to trust His will. We trust Him by receiving the Lord's counsel rather than insisting that He take ours.

PRINCIPLE NUMBER 3
Love Abundantly

The third principle that I would urge you to adopt is to love abundantly. In most any situation we face, love really is the answer. We can trust that the will of the Lord is motivated entirely by perfect love. When we cannot understand the things that are happening—or the things that are not happening—the one true constant is the perfect love of God. You can trust it entirely.

Alma counseled the people of the Church to avoid contention and to have "their hearts knit together in unity and in love one towards another."[22] I have found that my happiness is multiplied and my challenges are dulled when I have opened my heart to be knit in loving ties to friends, colleagues, and family. The Savior commanded us to love even our enemies and to do good to those who despitefully use us.[23] My life is not defined by the blessings I have not received but by the abundance of love and blessings that I have received.

My maternal grandmother, Norma Seneca, was a great example of expansive, abundant love. She lived her whole life on the Cattaraugus Reservation. Though her geographic frame of reference was limited,

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INDEED, WE ARE
"GRAVEN . . . UPON THE PALMS
OF [HIS] HANDS."

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her understanding and wisdom were wide and deep. I especially admired her ability to take genuine, full-throated joy in the good things that happened to others. I loved telling her my good news because she was so thrilled when good things happened to me. She never begrudged others their successes. She rejoiced with those who rejoiced. It was the habit of a generous spirit who multiplied and expanded the happiness of her life, even in the many difficulties she endured.

It is not always easy to love. I have often called upon the wise counsel my mother gave me when I was relating to her some perceived injustice I had suffered. I insisted that my grievances were justified. Knowing she could not undo the injustice, my mother advised me to "throw a blanket of mercy" over the situation. In essence, she advised me to love, to forgive, and to show mercy even when I felt my demand for justice was valid. She urged me to let mercy pay the debt and satisfy my claims. This advice has saved me much anguish and provided me great relief when I have been able to heed it. Choosing to love is choosing to heal from the spiritual wounds inflicted by injustice and suffering.

One important way that we magnify our love to others and to the Lord is through the words that we speak. Many Native American creation stories describe the world's creation as having been brought about because the Creator spoke it. Speaking is, in a way, giving birth to ideas and forming and shaping our reality. Similarly, in the creation account in Genesis, we understand that God said, "Let there be light: and there was light."[24] One title for the Savior is "the Word."[25]

Our words are powerful beyond measure. Words have the power to create and heal, but they also have the power to destroy and wound. Let us speak with abundant love and use the power that is ours to heal and build others, just as the Savior uses His.

Most important, we should not place conditions or limits on the love that we offer to our Father in Heaven and His Son. But even when we have done so, having withheld love or obedience, He stands ever ready to receive and heal us. As often as we will repent, He will forgive. His arms are ever outstretched. We can trust His love.

So we ask: "Where can I turn for peace? . . . Where is the quiet hand to calm my anguish?"[26]

Here is the reply: "He answers privately, Reaches my reaching In my Gethsemane, Savior and Friend. Gentle the peace he finds for my beseeching. Constant he is and kind, Love without end."[27]

My brothers and sisters, I testify that He is constant and kind. He is worthy of our trust and adoration. That we may choose to trust in Him during times of doubt or difficulty is my prayer, in the name of Jesus Christ, amen. cm

NOTES

1 D&C 88:118.
2 "Where Can I Turn for Peace?" *Hymns,* 2002, no. 129.
3 Luke 6:38.
4 "How Firm a Foundation," *Hymns,* 2002, no. 85; see also 1 Peter 4:12.
5 See Arthur C. Parker, "The Constitution of the Five Nations or the Iroquois Book of the Great Law," in *Parker on the Iroquois: Iroquois Uses of Maize and Other Food Plants; The Code of Handsome Lake, the Seneca Prophet; The Constitution of the Five Nations,* ed. William N. Fenton (Syracuse, New York: Syracuse University Press, 1968), 37, article 24 of "The Council of the Great Peace." See also Wikipedia, s.v. "seven generation sustainability," en.wikipedia.org/wiki/Seven_generation_sustainability.
6 Moroni 4:3, 5:2; D&C 20:77, 79.
7 Alma 36:3.
8 Neal A. Maxwell, "Enduring Well," *Ensign,* April 1997; see D&C 122:7.
9 Jacob 4:10.
10 2 Nephi 9:20.
11 2 Nephi 9:28.
12 2 Nephi 9:28–29.
13 Matthew 7:11.
14 3 Nephi 6:14.
15 3 Nephi 6:12.
16 Jacob 4:10.
17 1 Nephi 1:1 (Spanish).
18 1 Nephi 1:1.
19 See 1 Nephi 21:16; Isaiah 49:16.
20 Matthew 26:38.
21 Matthew 26:39.
22 Mosiah 18:21.
23 See Matthew 5:44.
24 Genesis 1:3.
25 John 1:1; see also verse 2.
26 "Where Can I Turn for Peace?"
27 "Where Can I Turn for Peace?"

ART

Page 15: Minerva Teichert (1888–1976), *Moroni and the Title of Liberty,* c. 1930, oil in canvas, 72 x 1 5/16 x 108 inches. Brigham Young University Museum of Art. Page 16: Minerva Teichert (1888–1976), *The Law on the Plates of Brass,* 1949-1951, 36 x 48 inches. Brigham Young University Museum of Art, 1969. Page 19: Minerva Teichert (1888–1976), *The Sacrament,* 1949–1951, oil on masonite, 36 x 48 inches. Brigham Young University Museum of Art, 1969. Page 20: Minerva Teichert (1888–1976), *Touch Me Not,* 1937, oil on canvas, 76 ½ x 59 ¾ inches. Brigham Young University Museum of Art.

By Stephanie Barclay

BYU ASSOCIATE PROFESSOR OF LAW

First Amendment Harms

ILLUSTRATIONS BY JAMES STEINBERG

David Rasheed Ali is an observant Muslim and a prison inmate who requested an exemption from the prison's restrictive policies that prohibited him from wearing a *kufi*, a knit skullcap, as required by his religious beliefs.[1] One might be tempted to conclude that wearing a kufi is both harmless and costless, making the decision to grant a religious exemption relatively straightforward. But even something as seemingly innocuous as religious head coverings contains a number of hidden potential costs and harms: hundreds of thousands of dollars in estimated redistributed staff time and resources to implement a new policy;[2] fewer resources for other inmates for better healthcare, activities, facilities, or food;[3] heightened physical risk for prison guards who must enter an inmate's "strike zone" to search personal items;[4] and increased risk of deadly contraband being secreted in a headgear hiding spot.[5]

On the other hand, failing to grant an exemption causes spiritual and dignitary harm to Ali, who must violate his conscience. Additionally, numerous studies suggest that providing religious protections for inmates decreases prison violence and results in significant rehabilitative positive externalities, not just for other inmates and securities but for society at large.[6] In light of these competing and varied externalities, how should we think about Ali's religious exemption request?

This is an abridged version of an article soon to be published in the Indiana Law Journal*: 95 IND. L. J. (forthcoming 2020).*

THIRD-PARTY HARM THEORY

These sorts of questions about harm related to religious exemptions are particularly weighty at this specific moment in history, when religious exemptions have perhaps never been more controversial or hotly debated in legal scholarship. Especially in light of Supreme Court cases like *Hobby Lobby* and *Masterpiece Cakeshop*, some scholars have advanced new theories that would place strict limits on government's ability to grant religious exemptions that result in harm to third parties who do not benefit from that religious practice.[7] These theories have inspired recent legislation (including the 2019 Equality Act and the 2018 Do No Harm Act)[8] and are gaining traction among some judges.[9] And just recently, four Justices on the Supreme Court signaled that they may want to revisit the Court's jurisprudence for offering religious exemptions.[10]

Iterations of this theory, referred to in this article as the "third-party harm theory," rely on both descriptive and normative claims. Descriptively, the theory asserts that Supreme Court cases are best understood as categorically prohibiting religious exemptions that result in cognizable harm to third parties. Normatively, other third-party theorists make the claim that it is "disturbing" to "forc[e] third parties to pay for the exercise of [religious] rights" of other parties.[11]

What has not received attention in the literature is a theoretical critique of the generic harm principle on which the theory relies. Specifically, proponents of the third-party harm theory echo longstanding views—articulated long ago by John Stuart Mill—that the ability of individuals to exercise their religious rights depends on whether such liberty does not cause "harm to others."[12]

Third-party harm theorists take this harm principle a step further: Whereas Mill argued that harm was a necessary, though not always sufficient, condition justifying government interference with individual liberty, third-party harm theorists argue that the mere presence of harm is a sufficient condition *requiring* government restriction of religious rights. This significantly raises the stakes for determining what counts as cognizable harm under their theory.

"HARM" AS A TERM OF ART

Reliance on a harm principle as justification for government interference has strong intuitive appeal. At least superficially, it seems to be a theoretical shortcut for avoiding other difficult moral questions about which causes a government should or should not advance—a question on which there is little consensus in a pluralistic society. Pointing instead to harm seems like a neutral method for bypassing such moral conundrums. If this were true, there is no question that this method would present a desirable means of making a great many normative decisions in society. Indeed, this sort of principle for decision-making has been attempted in numerous fields over numerous decades, from criminal law to environmental law.[13] But unfortunately, significant moral question begging is involved in determining what exactly we mean by "harm."

If the harm principle is broadened to include more expansive notions, like dignitary harm, arguably "every action generates some harm cognizable under the expanded harm principle."[14] Thus, any action would justify government restriction of rights. The most expansive notion of harm would include a subjective understanding, where any perceived negative impact on someone counted as harm. Unless we use this broad subjective standard, then "harm" must become a term of art that includes some sorts of interests and excludes others. But once a technical definition has been adopted, that definition must operate on top of a deep normative theory about which types of harm count and why.

The normative appeal of the harm principle stems from its superficial simplicity. But once "harm" becomes a term of art, the normative justification for the theory becomes quite complex.[15] The plausibility of the harm principle is built on the assumption that there will be a consensus about what constitutes harm. But there is no such consensus, only a plurality of views of what harm is.[16]

LACK OF A TRUE DEFINITION

Indeed, the lack of consensus on harm is highlighted by the fact that three different groups of third-party harm theorists understand harm as a term of art to mean three very different things: (1) a materiality standard, meaning a burden that is relevant to decision-making;[17] (2) an undue hardship standard for subsets of the population;[18] and (3) "targeted material or dignitary harms" on those who "do not share the [religious] claimant's belief."[19] None of these scholars provide clear normative justifications on why certain types of harm count under their definition and others do not.

In addition, recently proposed legislation inspired by iterations of these third-party harm theories relies on an entirely different definition of harm, specifically the Do No Harm Act. This act defines harm as including a specific laundry list of events, such as any exemption from anti-discrimination laws, provisions of healthcare services, and government contracting requirements.[20] Given this utter lack of consensus on what should count as harm, it is not surprising that scholars in other fields have observed the way a heavy reliance on a generic harm principle almost always collapses in upon itself.[21]

In light of Supreme Court cases like *Hobby Lobby* and *Masterpiece Cakeshop*, some scholars have advanced new theories that would place strict limits on government's ability to grant religious exemptions that result in harm to third parties who do not benefit from that religious practice.

The normative and doctrinal shortcomings with this undertheorized reliance on generic harm are highlighted by measuring the purported aims of this theory against its over- and underinclusive results. Specifically, it is overinclusive because if applied in an even-handed way, the theory would actually remove religious exemptions for groups like religious minorities that third-party harm theorists generally acknowledge should receive protection.[22] These groups include Muslim prison inmates, Sikhs in the workplace, and Amish communities.[23] The theory is normatively underinclusive because it fails to provide any explanation whatsoever for why some competing third-party harms are simply ignored in the calculus. Moreover, special prohibitions on religious harm, including things like dignitary harm, cannot be normatively justified by the argument that such harms are unique. A comparison of the types of harm we permit in the speech context demonstrates that religious harm is quite similar in all meaningful respects.

THREE TYPES OF HARM

Given the normative and descriptive shortcomings of the third-party harm theory, it is not surprising that courts are not, in fact, treating the presence of generic harm alone as categorically requiring the government to restrict religious rights. Instead, at times courts recognize and allow significant amounts of harm to third parties in order to protect every type of First Amendment right—not just religious rights. While the presence of harm may be a necessary condition to justify the government's restriction of First Amendment rights, the harm must also have certain characteristics.

Based on these characteristics, courts weigh a variety of competing harms, classifying them in three specific categories: (1) prohibited harms (which are categorically impermissible); (2) probative harms (which can be balanced against one another); and (3) inadmissible harms (which are given no weight, regardless of how severely or disproportionately the third parties experience them). A careful review of religious exemption case laws reveals that courts are not treating any harm to third parties as categorically prohibited. And competing harms always arise in the context of the protection of First Amendment rights.

THREE NORMATIVE QUESTIONS ABOUT HARM

This descriptive framework has important normative implications. A clear understanding of the role that harm plays in courts' treatment of various First Amendment rights highlights the fact that the protection of any right inherently concerns harms competing from either side of the ledger. The real question with which courts are often grappling is what the proper balance of "harm" ought to be. This framework does not treat the presence of any harm as a sufficient condition for restricting any right. Rather, it treats harm as part of an equation: however we are defining harm, it must be weighed in a consistent way for the government to determine the most socially beneficial outcome.

In this vein, this article proposes three normative questions we *should* be asking to the extent that we are treating harm as a relevant moral consideration in the First Amendment context.

1 *Are costs justified by the social goods they provide?*

When we are not fixated on asking whether a particular right is harmful or not (acknowledging that it always will be at some level), we can ask the much more fruitful normative question of whether inevitable costs are justified by providing important social goods.[24] Sometimes localized externalities are arguably balanced by a more diffuse social benefit. For example, one might consider the localized externalities resulting from state or local taxes related to the support of education in such a way.[25] Even families who do not have school-age children benefit from having a more educated citizenry and even higher property values in their neighborhoods when schools are high quality.[26] If we view externalities in this cost/benefit context, perhaps the most important normative question to ask is whether the cost of a right is a "good deal" for society. Where the social goods that society receives in exchange for harm are significant, then protection of the right might be deemed a social bargain, notwithstanding significant harm.[27]

The costs and benefits of free speech provide a particularly salient example of this sort of trade-off. Free expression has been justifiably described as a very costly right,[28] but free expression has also been described as one of America's "most precious" rights because its protection provides enormous social goods generally enjoyed by society.[29] These goods make it more likely that violations of other rights will be reported, operate as a precondition for democratic self-government, ensure political accountability, decrease government corruption and abuses of power, improve the quality of policy-making, and facilitate a host of other artistic, psychological, economic, moral, and even religious functions.[30] In less-developed countries, freedom of speech has even helped prevent famines.[31]

As Professor Joseph Raz has remarked:

If I were to choose between living in a society which enjoys freedom of expression, but not having the right myself, or enjoying the right in a society which does not have it, I would have no hesitation in judging that my own personal interest is better served by the first option.[32]

In other words, individuals in a society without freedom of expression suffer more from the loss of social goods that such a society will inevitably experience than the individual would suffer from lacking such freedoms herself and yet living in a society that generally protects

The protection of any right inherently concerns harms competing from either side of the ledger.

them. Protection of rights can thus secure goods for individuals far beyond those who actually enjoy the rights, which arguably justifies the high cost of protecting such rights.

Freedom of religion has similarly been described as a right that provides a significant social bargain to society, notwithstanding its costs.[33] This was something a number of the American founders believed. In his farewell address in 1796, President George Washington stated:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. The mere politician, equally with the pious man, ought to respect and cherish them.[34]

This argument has contemporary force as well. As Professor Rick Garnett has observed, religious accommodation provides a number of social goods, even for those who do not practice a religion at all.[35] One empirical study by Brian and Melissa Grim indicates that "[r]eligion annually contributes nearly $1.2 trillion of socio-economic value to the U.S. economy."[36] These include things like "130,000 alcohol recovery programs," or "120,000 programs to help the unemployed," or about 26,000 "active ministr[ies] to help people living with HIV-AIDS."[37] Similarly, Professors Stephen Holmes and Cass Sunstein have argued that one of the most important contributions of religious liberty is "peaceable social coexistence," as this right "permit[s] us to be autonomous in our deepest convictions" while still allowing "our religiously heterogeneous society to operate passably well."[38] Professor Douglas Laycock has likewise recently observed that protecting religious liberty "reduces social conflict" and "reduces human suffering."[39] Thus, Americans are willing to bear significant costs associated with rights imposed upon them in part because a whole range of precious public goods result from such protection of rights.

The social benefits that flow from both free speech and religious rights suggest that thick protections of these rights are warranted, even if at times costly for society and for third parties. These sorts of thick protections are illustrated by constitutional or statutory frameworks that require the government to satisfy strict scrutiny and demonstrate that it has a "compelling" justification for disregarding free speech or religious rights. Indeed, this is the standard required under the Religious Freedom Restoration Act (or RFRA). But once the government can demonstrate a compelling interest, for purposes such as preventing otherwise unavoidable significant harm to third parties, then the normative explanation is that at this point the cost is too great. Protecting that right is no longer a social bargain, and thus other harms outweigh that religious harm. This is the sort of normative question—woven into current legal frameworks—that we ought to be asking.

2 *Can institutions be modified to mitigate avoidable harms?*

Professor Joel Feinberg argues in his classic work *Harm to Others* that some sorts of harm arise from "bad social institutions," meaning institutions that cause conflicts that could be avoided, or at least mitigated, if the institution were modified.[40] In other words, perhaps much criticism regarding harm lies within a policy or institution that puts religious believers and other rights on a predictable and easily avoidable clash of harms.

For example, one of the high-profile contests of harms between religious liberty and third-party rights recently arose in the controversial case of Kim Davis, a former county clerk in Kentucky. After the Supreme Court legalized gay marriage, Ms. Davis was unwilling to issue marriage licenses to same-sex couples. Ms. Davis was also unwilling to have any marriage licenses for same-sex couples issued in her name. These religious objections resulted in preventing any same-sex couple in the county from obtaining a marriage license to which they were lawfully entitled. The denial of government services for these same-sex couples was a significant harm. On the other hand, Ms. Davis was ultimately sent to jail for five days and held in contempt of court because she was unwilling to violate her conscience.

Other states handled similar conflicts of conscience in a very different way: by modifying their institutions to mitigate harm to both parties. Utah, for example, passed a law that would

allow clerks to opt out of performing marriages for conscience-based reasons, so long as the office ensured that a willing clerk was on duty and available to perform marriages for any couple who requested it.[41] One need not agree with the policy or even the legality of such a compromise to acknowledge that this sort of institutional modification mitigated harms on both sides of the ledger.

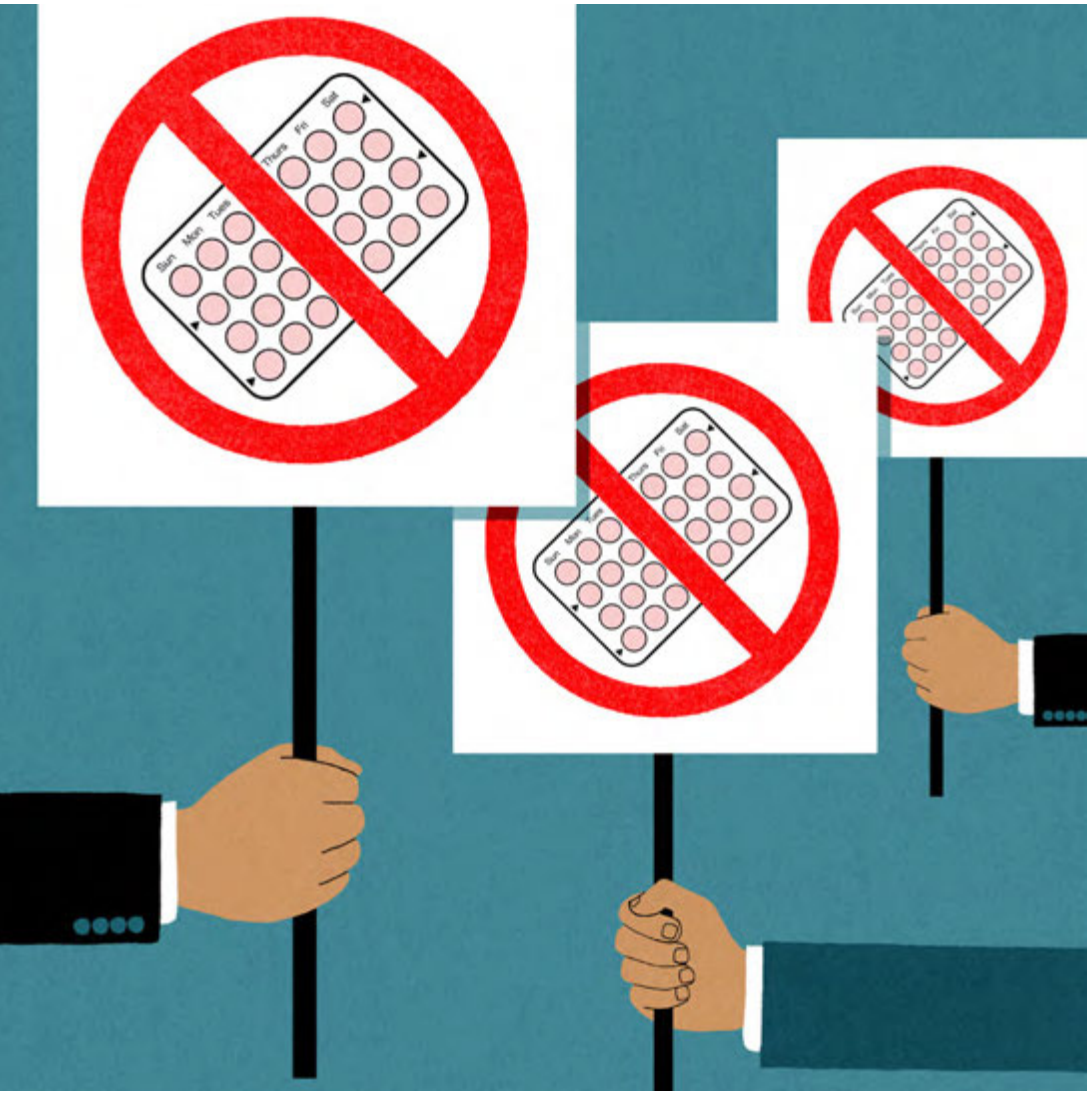
3 *Can the harm be distributed more justly?*

A final important question is whether the distribution of harm is just with respect to how benefits flowing from harm are distributed when compared to how the corresponding harm is being distributed throughout society. As third-party harm theorists have rightly observed, a just society should work to defray costs that are disproportionately borne by a subset of the population. Relying on the work of Professor Frederick Schauer, third-party harm theorists state, "It ought to be troubling whenever the cost of a general societal benefit must be borne exclusively or disproportionately by a small subset of the beneficiaries."[44] In many cases, government-funded alternatives to more evenly disperse externalities may provide precisely the sort of uncoupling of harm that Professor Schauer advocates for. And potential government-funded programs are relevant under the religious exemption framework of RFRA. Indeed, this was an important concern for the Supreme Court in its *Hobby Lobby* decision under RFRA's "less restrictive alternative analysis."

In *Hobby Lobby* the Court noted that the "most straightforward way" of ensuring that harms would not be disproportionately born by third parties "would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections."[45] The Court flirted with the idea that RFRA may, at times, require the creation of "a new, government-funded program" in order to both accommodate religious exercise and avoid disproportionate harms to third parties.[46] Some third-party harm theorists have criticized this approach as "not politically viable," which is certainly a reasonable practical concern.[47]

However, on June 1, 2018, the Department of Health and Human Services proposed a new regulation that would expand the definition of "low-income family" under Title X to include "women who are unable to obtain certain family planning services under their employer-sponsored health insurance policies due to their employers' religious beliefs or moral convictions."[48] This proposed rule would have ensured that if someone actually loses employer-sponsored contraceptive coverage as a result of religious exemptions, she will still have access to "free or low-cost family planning services," including contraceptives.[49] While only a proposed rule, this sort of expanded government program provides a good example of institutions or policies that can be revised so as to distribute harm more justly and decrease the magnitude of harm on both sides of the ledger. This line of inquiry may be a constructive area where both those who seek to avoid third-party harm and those who defend religious exemptions could find common-ground solutions aimed at dispersing any costs that society must incur to reap important social goods through the protection of conscience rights. cm

A new regulation . . . would expand the definition of "low-income family" under Title X to include "women who are unable to obtain certain family planning services under their employer-sponsored health insurance policies due to their employers' religious beliefs or moral convictions."



NOTES

1 Ali v. Stephens, 822 F.3d 776, 781 (5th Cir. 2016).

2 *Id.* at 796 (estimating $702,500 across the prison annually to implement a new policy allowing inmate use of headgear and implementing necessary safety precautions).

3 *See, e.g.*, Appellants' Initial Brief, United States v. Sec'y, Fla. Dep't of Corr., 828 F.3d 1341 (11th Cir. 2016) (No. 15-14117), 2015 WL 9412274.

4 Cox v. Stephens, No. 2:13-CV-151, 2015 WL 1417033, at *9 (S.D. Tex. Mar. 27, 2015) (discussing the strike zone).

5 *Ali*, 822 F.3d at 785, 794.

6 *See* Todd R. Clear and Melvina T. Sumter, *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. Offender Rehab. 127, 154 (2002); Byron R. Johnson et al., *Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 Just. Q. 145, 148 (1997) [hereinafter Johnson et al., *Religious Programs*] (internal citations omitted); Thomas P. O'Connor and Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. Offender Rehab. 11 (2002); *see also* Todd R. Clear and Marina Myhre, *A Study of Religion in Prison*, 6 Int'l Ass'n Res. & Cmty. Alt. J. on Cmty. Corr. 20 (1995); Byron R. Johnson, *Religiosity and Institutional Deviance: The Impact of Religious Variables upon Inmate Adjustment*, 12 Crim. Just. Rev. 21 (1987); Byron R. Johnson et al., *A Systematic Review of the Religiosity and Delinquency Literature: A Research Note*, 16 J. Contemp. Crim. Just. 32 (2000) [hereinafter Johnson, *Systematic Review*].

7 Frederick Mark Gedicks and Rebecca G. Van Tassell, Of Burdens and Baselines: Hobby Lobby's Puzzling Footnote 37, in The Rise of Corporate Religious Liberty 323 (Micah Schwartzman, et al. eds., 2016); Ira C. Lupu and Robert W. Tuttle, Secular Government Religious People 236 (2014) (discussing the "Establishment Clause

problem under Caldor of absolutely preferring religious interests to competing secular interests, and doing so at the expense of private third parties"); Douglas NeJaime and Reva Siegel, Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism, in The Conscience Wars: Rethinking the Balance Between Religion, Identity, and Equality 200 (Susanna Mancini and Michel Rosenfeld eds., 2018); Nelson Tebbe, Religious Freedom in an Egalitarian Age 49–70 (2017); Nelson Tebbe, Micah Schwartzman and Richard Schragger, How Much May Religious Accommodations Burden Others?, in Law, Religion, and Health in the United States 215–39 (Holly Fernandez Lynch, et al. eds., 2017); Nelson Tebbe, Micah Schwartzman and Richard Schragger, When Do Religious Accommodations Burden Others?, in The Conscience Wars: Rethinking the Balance Between Religion, Identity, and Equality (Susanna Mancini and Michel Rosenfeld eds., 2018); Frederick Mark Gedicks and Rebecca G. Van Tassell, RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion, 49 Harv. C.R.-C.L. L. Rev. 343 (2014); Andrew Koppelman and Frederick Mark Gedicks, Is Hobby Lobby Worse for Religious Liberty Than Smith?, 9 St. Thomas J. L. & Pub. Pol'y 223 (2015); Douglas NeJaime and Reva Siegel, Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop, 128 Yale L. J. F. 201, 204–05 (2018); Micah Schwartzman et. al., The Costs of Conscience, 106 Ky. L. J. 781, 786 (2018).

8 Equality Act, H.R. 5, 116th Cong. (2019), *available at* www.congress.gov/bill/116th-congress/house-bill/5/text; Do No Harm Act, S. 2918, 115th Cong. (2018), *available at* www.harris.senate.gov/imo/media/doc/Do%20No%20Harm%20Act.pdf; *see also* Hailey Lobb, *The Do No Harm Act Will Make Sure Doctors and Businesses Do Just That*, National Women's Law Center: The Latest (May 24, 2018), nwlc.org/blog/the-do-no-harm-act-will-make-sure-doctors-and-businesses-do-just-that; *Do No Harm Act*, Human Rights Campaign (Dec. 21, 2018), www.hrc.org/resources/do-no-harm-act.

9 *See*, *e.g.*, Holt v. Hobbs, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

10 *See* Kennedy v. Bremerton Sch. Dist., No. 18–12, 2019 WL 272131, at *3 (U.S. Jan. 22, 2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in denial of certiorari) (discussing the possibility of revisiting *Employment Division v. Smith*).

11 Schwartzman et al., *supra* note 7, at 810, 812.

12 John Stuart Mill, *On Liberty*, *in* The Essential Works of John Stuart Mill 253, 263–66 (Max Lerner ed., 1961).

13 In the criminal context, progressives have argued that "victimless crimes" should not be prosecuted, such as drug use or prostitution. In response, conservatives have responded by pointing to harm related to such crimes and have also at times relied on a harm principle to justify banning things like pornography. Bernard E. Harcourt, The Collapse of the Harm Principle, 90 J. Crim. L. & Criminology 109, 139 (1999); *see also* Steven G. Calabresi, On Liberty, Equality, and the Constitution: A Review of Richard A. Epstein's The Classical Liberal Constitution, 8 N.Y.U. J. L. & Liberty 839, 956 (2014) ("Drug use, like suicide, is not a victimless crime. The victims of drug abuse include not only the abuser but also his family and his friends."); Jerry Cederblom and Cassia Spohn, A Defense of Retributivism Against Criticisms of the Harm-for-Harm Principle, 43 No. 6 Crim. Law Bulletin Art. 4 (2007) ("We maintain that most crimes that are called 'victimless' do indeed have victims, that in these cases the harm-for-harm principle can be applied, and that in the remaining cases decriminalization and treatment are probably appropriate. Although drug use often is portrayed as a victimless crime, potential victims include children (if drugs are used while caring for children), motorists (if drugs are used while driving), and neighbors (if drug use results in neighborhood deterioration). Similarly, the practice of prostitution has both direct and indirect victims. Prostitutes themselves are often victims of their pimps."). Conversely, in the environmental context some libertarians have argued that only when a landowner causes environmental harm to a neighbor should that justify government interference with the landowner. Richard Epstein, Principles for a Free Society 98–99 (1998); *see also* Donald J. Kochan, A Framework for Understanding Property Regulation and Land Use Control from a Dynamic Perspective, 4 Mich. J. Envtl. & Admin. L. 303, 322–23 (2015) ("[J]udicial land use controls—particularly nuisance—are designed to enforce the prohibition against harming others. Put differently, they prevent one from imposing impermissible negative externalities on others."). But progressives have argued for a broader conception of harm that would include things like greenhouse gas emissions and other downstream externalities to the environment. Epstein, *supra* (discussing progressive arguments).

14 Epstein, *supra* note 13, at 102.

15 *See* Steven D. Smith, the Disenchantment of Secular Discourse 70–106 (2010) (critiquing the harm principle on this basis in other contexts).

16 Epstein, *supra* note 13, at 76 ("Should the application of the [harm] principle be limited to physical harm? What about competitive harms? Blocking of views? Personal offense? False or insulting words? No shortcut answers all the variations on the common theme.").

17 Professor Gedicks and Van Tassell argue that harm means a "material" burden on others, meaning a burden that is "relevant . . . to decisions about how to act in some relevant way." Gedicks and Van Tassell, RFRA Exemptions, *supra* note 7, at 365–66.

18 Professors Tebbe, Schwartzman, and Schragger argue that the proper inquiry is whether an accommodation imposes an "undue hardship" on others, which they described as a burden that is more than "de minimis." Schwartzman et al., *supra* note 7, at 799 n. 86; *see also* Tebbe, *supra* note 7, at 63; Tebbe et al., How Much May Accommodations Burden Others, *supra* note 7.

19 Professors NeJaime and Siegel argue that cognizable harm only arises if "granting the religious exemption can inflict . . . targeted material or dignitary harms" on "those who do not share the claimant's belief." NeJaime and Siegel, Conscience Wars, *supra* note 7, at 200.

20 *See* Do No Harm Act, S. 2918, 115th Cong. (2018), *available at* www.harris.senate.gov/imo/media/doc/Do%20No%20Harm%20Act.pdf.

21 *See, e.g.,* Harcourt, *supra* note 13, at 139–140; Smith, *supra* note 16, at 70–106.

22 Schwartzman et al., *supra* note 7, at 786–87 ("Taxpayers have no reason to complain if the government uses their funds to lift burdens on a religious minority, provided the government is not advancing religion but protecting religious freedom, which is a secular good.").

23 For a thoughtful discussion about why protection of minority religious groups is so important, *see* Thomas C. Berg, Minority Religions and the Religion Clauses, 82 Wash. U. L. Q. 919, 945 (2004).

24 Stephen Holmes and Cass R. Sunstein, The Cost of Rights: Why Liberty Depends on Taxes 117 (2013).

25 Thanks to Professor Frederick Gedicks for this example.

26 *See* Gladriel Shobe, Economic Segregation, Tax Reform, and the Local Tax (draft on file with the author).

27 Holmes and Sunstein, *supra* note 24, at 177.

The social benefits that flow from both free speech and religious rights suggest that thick protections of these rights are warranted, even if at times costly for society and for third parties.

28 Frederick Schauer, Uncoupling Free Speech, 92 Colum. L. Rev. 1321, 1321–22 (1992) ("The capacity of speech to cause injury in diverse ways contends with the goal of strong free speech (and free press) protection, and it is commonplace that robust free speech systems protect speech not because it is harmless, but despite the harm it may cause. Given that existing First Amendment doctrine protects those who negligently and erroneously charge public officials and public figures with criminal behavior, immunizes from tort liability publications causing bodily injury or death, and shields from prosecution those who successfully abet violent criminal acts, it can scarcely be denied that a major consequence of a highly protective approach to freedom of speech and freedom of the press is to shelter from legal reach a set of behaviors that could otherwise be punished and a set of harms that could otherwise be compensated."); *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 281 (1964) ("[O]ccasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great.").

29 Holmes and Sunstein, *supra* note 24, at 107.

30 *Id.* at 107–08.

31 *Id.* at 108 (citing Jean Dreze and Amartya Sen, India (Oxford: Oxford University Press, 1996)).

32 Joseph Raz, Ethics in the Public Domain: Essays in the Morality of Law and Politics 39 (Oxford: Clarendon, 1995).

33 For an interesting discussion of the various contexts in which religious organizations provide social services, *see* Thomas C. Berg, Partially Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits, 91 Notre Dame L. Rev. 1341 (2016).

34 George Washington Farewell Address 1796; *see also* Arlin M. Adams and Charles J. Emmerich, A Heritage of Religious Liberty, 137 U. Pa. L. Rev. 1559 (1989).

35 Richard W. Garnett, Accommodation, Establishment, and Freedom of Religion, 67 Vand. L. Rev. En Banc 39, 49 (2014) ("We all have a stake in efficient and transparent markets, functioning courts, and clean air. Similarly, we all benefit, whatever our religious tradition and whether or not we embrace or practice a religious faith at all, from practices and commitments—like the accommodation of religion—that place limits on the state, on its demands, and on its authority."); Richard W. Garnett, Religious Liberty, Church Autonomy, and the Structure of Freedom, in John Witte Jr. and Frank S. Alexander, Christianity and Human Rights: An Introduction (2010).

36 Brian J. Grim and Melissa E. Grim, The Socio-economic Contribution of Religion to American Society: An Empirical Analysis, 12 Interdisc. J. Res. on Religion 1556 (2016); National Press Club, $1.2 Trillion Religious Economy in U.S., Religious Freedom & Bus. Found. (Sept. 13, 2016), religiousfreedomandbusiness.org/1-2-trillion-religious-economy-in-us.

37 Grim and Grim, *supra* note 36; National Press Club, *supra* note 36.

38 Holmes and Sunstein, *supra* note 24, at 182.

39 Douglas Laycock, The Broader Implications of Masterpiece Cakeshop, byu L. Rev. (forthcoming 2019).

40 Joel Feinberg, Harm to Others 220 (1984) ("A form of competition is illegitimate if it is avoidable" (internal quotation marks omitted)).

41 S.B. 297, 2015 Leg., Gen. Sess. (Utah 2015); Dennis Romboy, New law helps Utah avoid marriage license conflict playing out in Kentucky, Deseret News (Sept. 3, 2015), www.deseretnews.com/article/865636031/New-law-helps-Utah-avoid-marriage-license-conflict-playing-out-in-Kentucky.html; Dennis Romboy, US can learn from Utah on gay marriage license issue, professor says, ksl (Sept. 4, 2015), www.ksl.com/article/36356546; Ben Winslow, Governor signs bill letting clerks opt out of same-sex marriages on religious grounds, fox 13 (Mar. 21, 2015), fox13now.com/2015/03/20/governor-signs-bill-letting-clerks-opt-out-of-same-sex-marriages-on-religious-grounds.

42 Zubik v. Burwell, No. 14-1418, 2016 WL 1203818 (U.S. Mar. 29, 2016).

43 Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016).

44 Schwartzman et al., *supra* note 7, at 810 (quoting Frederick Schauer, Uncoupling Free Speech, 92 Colum. L. Rev. 1321, 1322 (1992)).

45 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 727 (2014).

46 *Id.*

47 Frederick Mark Gedicks, One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens, 38 Harv. J. L. & Gender 153, 161 (2015).

48 83 Fed. Reg. 25,502, 25,514 (June 1, 2018) (to be codified at 42 C.F.R. pt. 59).

49 *Id.*

"TO DO JUSTLY, AND TO LOVE MERCY"

ARBITRATING DIVINE LAW IN EARLY MODERN ART

by Elliott D. Wise

BYU ASSISTANT PROFESSOR OF
ART HISTORY, DEPARTMENT
OF COMPARATIVE ARTS AND LETTERS

The legal process is a far-reaching endeavor, with reverberations in many facets of society. It should come as no surprise, then, that law also impacts the visual arts. I study Christian devotional art in the medieval and early modern eras, and the paintings and sculptures produced in those periods frequently ruminate on ideal forms of jurisprudence and the administration of clemency and justice. Always hovering over earthly systems of justice is the Last Day, when souls will be consigned to heaven or hell by the great Judge, assisted by the advocacy of the Virgin Mary, St. John the Baptist, and other important saints who serve as "lawyers" for mankind in that final, celestial courtroom.


GVSTAV
KLIMT.
07

PREVIOUS PAGE:
Gustav Klimt (1862–1918). *Adele Bloch-Bauer I*. 1907. Photo: Neue Galerie New York / Art Resource, NY.

To begin, let us think broadly about the ways in which art and law intersect. Art is frequently used to represent certain legal principles, sometimes to such a degree that they become iconic. For instance, when we see a woman with a blindfold holding a sword and a pair of scales, we immediately know that she is an allegory of justice. But art gives voice to quite different aspects of legal practice as well. Iconoclasm—or the "destruction of images"—is often connected to politics and law. In ancient Rome, when an emperor fell from favor and was condemned for crimes against the state, the senate would sometimes pass a *damnatio memoriae*, or "damnation of memory," against him. One of the most significant ways the emperor's memory was "damned" was by destroying his public portraits. Sometimes his images would be completely obliterated, but at other times a statue or painting might be only partially disfigured. For instance, the nose might be knocked off so that the emperor's likeness would remain recognizable but now with punitive "scars" for all to see.[1]

Art also reinforces the authority of the law. In a courthouse you might find portraits of local or national rulers—sometimes positioned directly above the bench—in order to indicate the judge's source of authority. In early modern Europe, when someone was condemned to death by hanging, a friar would sometimes hold an image of the crucified Christ on a pole near the face of the condemned so that the last thing the dying man or woman looked upon would be the dying Savior.[2] In this way, the likeness of their ultimate Judge would be imprinted on their minds and perhaps even aid their penitential process, inspiring a last chance at mercy.

ART AND LEGAL DISPUTE

Among the most dramatic intersections of art and law are the notorious legal battles surrounding high-profile works with disputed ownership or histories of theft. Gustav Klimt's *Portrait of Adele Bloch-Bauer I* is a lavishly gilded painting completed in 1907 during the peak of the Austrian art nouveau style (*Jugendstil*). Recently made famous by the film *Woman in Gold*, the portrait depicts the Jewish Viennese heiress Adele Bloch-Bauer.

Bloch-Bauer had a large art collection, which she left to her husband when she died in 1925. In 1938, on the verge of World War II, Austria was annexed to Germany, and Bloch-Bauer's husband—also a Jew—fled to Switzerland, where he later died in 1945. Rather than being passed to surviving family, the couple's paintings fell into the hands of the Nazis, who amassed priceless collections of confiscated art. Hitler was himself an amateur artist and as a young man even aspired to become a painter. Much of the art stolen by the Third Reich came from Jewish victims of the regime. Some paintings and sculptures were returned to their owners after the war, but many are still lost, unclaimed, or under dispute.

When the Nazis fell from power, the Austrian state claimed some of the stolen art, including the *Portrait of Adele Bloch-Bauer I*, which ended up as a signature piece in the Klimt collection of the Austrian Gallery. But then in 1998, Adele Bloch-Bauer's niece, Maria Altmann, asserted her rights to her aunt and uncle's art collection. The Austrian Gallery responded that the portrait was the property of the state and that it would not be returned to the family. A legal battle ensued, and eventually Altmann won the dispute. Today the *Portrait of Adele Bloch-Bauer I* hangs in New York City in the Neue Galerie. This case is just one instance of the intrigue and crime that accrue to some of the world's most coveted works of art.

ABOVE: Rogier van der Weyden (ca. 1399–1464). *Altar of the Last Judgment*. 1434. Photo: Erich Lessing / Art Resource, NY.

IN THE COURT OF THE HEAVENLY JUDGE

Depictions of Judgment Day take pride of place on the spectrum of legal images. A particularly iconic example from the early Renaissance in Burgundy is the Beaune Altarpiece *Last Judgment*, painted by Rogier van der Weyden in the mid-15th century. It was once the centerpiece of the chapel in the Hôtel-Dieu, a richly endowed hospital for the poor in Beaune, France. Renaissance hospitals functioned primarily as hospices, making the sick comfortable in their last weeks of life. Care for the soul and spiritual preparation for death were the primary objectives for the hospital staff, and at the Hôtel-Dieu, the beds were arranged so that the dying could contemplate Rogier's *Last Judgment*.

In the altarpiece, Christ sits on a rainbow directly above St. Michael the Archangel, who assists the Lord by weighing souls on a large pair of scales. The screaming soul tilting the right-hand balance down is labeled "Peccata" (sins), while the soul on the left is light and unburdened and labeled "Virtutes" (virtues). St. Michael fixes the viewers—dying patients in the hospital—with his razor gaze, asking them to consider their own end.[3] Would their souls be light with virtue or heavy with sin when they stood at God's judgment bar?

Meanwhile, Christ appears as a perfectly impartial judge—perfect justice balanced with perfect mercy.[4] Although his face is impassive, he displays the wounds in his hands, feet, and side as wellsprings of compassion and badges of redemption. His scarlet cloak seems dyed in his own blood, the blood of "the Lamb that was slain."[5]

On the Lord's right is a lily of mercy with white letters that run upward toward his face, reading, "Come, ye blessed of my Father, inherit the kingdom prepared for you from the foundation of the world."[6] On Christ's left, the sword of justice is accompanied by dark red letters, which tumble downward like the cascading folds of his cloak, mimicking the fall of the damned down to hell. These words read, "Depart from me, ye cursed, into everlasting fire, prepared for the devil and his angels."[7] Meanwhile, the Virgin Mary and St. John the Baptist—mankind's two most powerful intercessors before the throne of the great Mediator himself—fall to their knees in advocacy for the souls below, who beseech them for their prayers as they rise from the ground in the Resurrection.

Rogier's clear and orderly view of Judgment Day, with its cast of assistant judges and saintly "attorneys," is in keeping with centuries-old iconographic conventions. Not

Gislebertus. Close up of element of *The Last Judgment*. Ca. 1130. Autun Cathedral, Burgundy, France.

far from the Hôtel-Dieu, the French town of Autun is home to a renowned Last Judgment relief carved over the portal of the 12th-century church of Saint-Lazare.[8] One of the most noticeable differences between Saint-Lazare's organized vision of divine justice and Rogier's is the treatment of hell. In the former, monstrous, claw-like hands descend to strangle the damned while other souls with distended jaws scream. In Rogier's composition, by contrast, the damned are not being forced to their doom by demons or pitchforks. Rather they run into hell of their own volition, chased from God's presence by the indictment of their consciences.[9] Rogier's Renaissance depiction of hell is arrestingly psychological.

Last Judgment portrayals are among the few medieval and early Renaissance scenes that nearly always include nude figures. The souls raised from the dead in Rogier's painting and brought before the bar of God are naked, echoing Job's words, "Naked came I out of my mother's womb, and naked shall I return thither: the Lord gave, and the Lord hath taken away."[10] The nudity also points to God's omniscience at Judgment Day—he knows everything about each soul and nothing can be hidden from him. But just as God clothed Adam and Eve after they shamefully acknowledged their nudity, angels sometimes provide clothes for the saved in representations of the Last Judgment. Those who are found unworthy of God's presence are left to burn in their nakedness forever. The spare number of souls entering into heaven on the left of Rogier's altarpiece attests to the common Renaissance belief that the majority of humanity would not make it to the celestial city.

AN AMBIGUOUS DOOMSDAY

Another Last Judgment scene, albeit from much later in the Renaissance, is Michelangelo Buonarroti's great altarpiece fresco for the Sistine Chapel in Rome. It had been more than 20 years since he had completed his work on the Sistine ceiling, and by the time he returned to paint the *Last Judgment*, his style had changed. Michelangelo is generally grouped in the Italian High Renaissance, an art historical period characterized by idealized figures, balance, symmetry, harmonious colors, and often a stable, triangular organizing principle.

In his later life, however, Michelangelo increasingly exhibited conventions known as Mannerism. Mannerist art exaggerates High Renaissance idealism to the point of artificiality. It exaggerates, distorts, uses strange colors, alters anatomical proportions, and twists figures into cramped, uncomfortable, and sometimes impossible positions. These conventions create an idiosyncratic beauty, often embedded with erudite references. In fact, Mannerist art has much in common with poetry, in which the natural cadence and lexicon of language is "forced" into an artificial meter or rhyming sequence for aesthetic and expressive purposes.

In contrast to Rogier's predictable, orderly view of the heavenly court, chaos seems to reign in the Sistine fresco. There is no clearly defined triangular compositional structure. Instead, angels, saints, and sinners alike swirl in a blue vortex. Christ and his attendants have all of heaven in which to move, and yet somehow it feels as if there is not enough space. The ring of apostles surrounding the Lord, for instance, is hopelessly cramped. Additionally, the proportions of the figures are inaccurate. The oddly beardless Christ is titanic in size, as if emulating Roman statues of the god Apollo, while the Virgin Mary is much too little and appears to cower beside him.[11] Illogically, the figures at the bottom of the fresco and closest to the viewer are the smallest, with the scale increasing higher up in the sky.

It has been suggested that the exaggerated, "unsettled" quality of Mannerist art may be connected to a general anxiety that characterized the early 16th century. The Protestant

Looming over the celebrant at the altar, Charon communicates to the papal court the distressingly ambiguous message of the entire painting:

NO ONE IS SAFE.

Michelangelo Buonarroti (1475–1564). Sistine Chapel with the retable of the *Last Judgment* (*Fall of the Damned*). 1534–41. Photo: Erich Lessing / Art Resource, NY.

Reformation destabilized the sociopolitical landscape of Western Europe, and in 1527 the Holy Roman Emperor Charles V invaded and sacked Rome.[12] Whether or not these events directly affected Michelangelo's art, anxiety certainly pervades his fresco. Even the saints surrounding Christ and assisting him in the judgment look doubtful about the state of their souls. Many of them hold the instruments of their martyrdoms or other identifiable attributes: St. Andrew with a cross, St. Peter with "the keys of the kingdom,"[13] and St. Lawrence with the grill on which he was allegedly roasted to death. St. Bartholomew, said to be flayed alive, appears to the right and just below the Lord, holding a knife and his own skin, as if it were an old coat. The flayed face—distorted and askew in the folds of loose skin—is a self-portrait of Michelangelo.[14]

Traditionally, saved souls appear on Jesus's right, welcomed into paradise by his hand lifted in blessing, while the damned are cast off on his left. Michelangelo's Christ, however, makes curiously ambiguous gestures. His right hand is raised in a powerful but forbidding manner, while his left hand is much gentler. Although the left-hand gesture could be interpreted as softly pushing souls aside, the fingers come surprisingly close to making the ancient sign of benediction.[15] In light of the violent struggles over salvation and heresy in the wake of the Reformation, the uncertainty embedded in Michelangelo's conception of doomsday rattles viewers' confidence in their standing within God's legal system.[16]

Shrinking beneath her son's heavy hand, the Virgin Mary seems at a loss, incapable of getting an intercessory word in edgewise. On Christ's left, horrific monsters pull souls down

to the inferno. According to Giorgio Vasari's 16th-century biography of Michelangelo, the man in the lower right corner surrounded by devils and wrapped in serpents is a portrait of the papal master of ceremonies, who complained to the pope that Michelangelo had included too much nudity in the fresco. Michelangelo supposedly painted him into hell in retribution for his criticism.[17] The Sistine *Last Judgment* uses both the traditional convention of torturing demons to haul the damned away to hellfire and Rogier's more psychological punishment, with the weight of conscience and eternal guilt crushing them down to the fiery pit.

The positioning of the *Last Judgment* within the Sistine Chapel has stirring implications. For hundreds of years, this sacred space has been reserved for solemn liturgies and conclaves to elect new popes. While celebrating mass at the chapel altar, the pope, cardinals, and assistants would face Michelangelo's fresco. Their vision would most readily be filled not with the blessed in paradise but rather with frightening images, including the green, demonic figure of Charon, who in Greco-Roman mythology rows souls across the River Styx into the underworld. The monstrous demigod is here beating his luckless passengers with an oar. Looming over the celebrant at the altar, Charon communicates to the papal court the distressingly ambiguous message of the entire painting: No one is safe. All are in danger of being smitten by Charon's oar and the condemning hand of the divine Judge.

Gerard David (ca. 1460–1523). *The Judgment of Cambyses* (left panel). 1498. Photo: Groeningemuseum / HIP / Art Resource, NY.

IMPLEMENTING DIVINE LAW IN THE SECULAR SPHERE

Renaissance notions of justice, punishment, and jurisprudence were also expounded in more secular works of art. In the duchy of Burgundy, where Rogier lived and worked, town halls were important centers for legal debates, municipal legislation, and rulings. The city of Bruges in modern-day Belgium is known today for its chocolate shops, waffles, and dark canals with swans. In the 15th century, however, Bruges and its town hall were the epicenter of the Burgundian court. The city magistrates commissioned Gerard David, one of Bruges's most preeminent artists, to paint a narrative of "righteous judgment" in order to remind them of their scriptural mandate "to do justly, and to love mercy."[18]

David's *Judgment of Cambyses* depicts a Persian emperor and a corrupt judge on two panels. The paintings make use of "continuous narrative," meaning that different moments in the story play out in the same space. In the background of the left panel, a judge named Sisamnes is accepting a clandestine bribe in exchange for legal indemnity. In the foreground, allegations of corruption have reached the ears of Emperor Cambyses, and he confronts Sisamnes at his judgment seat. Significantly, the architectural setting depicted by David includes reference to a contemporary municipal space in Bruges known as the *Poortersloge*.[19] Moreover, Cambyses's retinue of officials are likely portraits of Bruges's own justice officers.[20] Those men would have carefully pondered the moral of the painting in precisely the way that the Persian magistrates closely observe their emperor's model of disciplinary action.

Cambyses uses his fingers to enumerate the charges leveled against Sisamnes as a thuggish figure takes the condemned judge by the arm to lead him away. Sisamnes's face betrays his fear of the law, and the classical roundels mounted on the wall behind his throne reference mythological stories, including Apollo's ruthless retribution against the foolish and presumptuous satyr Marsyas—a grim portent of things to come.[21]

The grisly punishment of Sisamnes occupies the foreground of the right panel. Like the mythological Marsyas, he has been condemned to be flayed alive. Cambyses looks on solemnly, like an impassive representative of the divine Judge in the heavens. One of the most disturbing details in the composition concerns the executioner on the right, near Sisamnes's foot. Needing both of his hands to grip the judge's skin, he has temporarily stowed his blood-stained knife between his teeth. Equally gruesome is the story's epilogue in the background of the right panel, where Sisamnes's young son has replaced his father on the judgment seat. Lest the son ever be tempted to take bribes himself, the back of his throne has been hung with his father's skin as a visceral reminder.

Gerard David (ca. 1460–1523). *The Flaying of the Corrupt Judge Sisamnes* (right panel). 1498. Photo: Groeningemuseum / HIP / Art Resource, NY.

Michelangelo Merisi da Caravaggio (1571–1610). *The Calling of St. Matthew*. 1598/1601. Photo: Album / Art Resource, NY.

Although chilling in its severity, the paintings' message expresses Bruges's unflinching allegiance to "do justly." There is less evidence, at least in this particular case study, of the city's commitment to "love mercy"!

CONFESSION AND RECOMPENSE

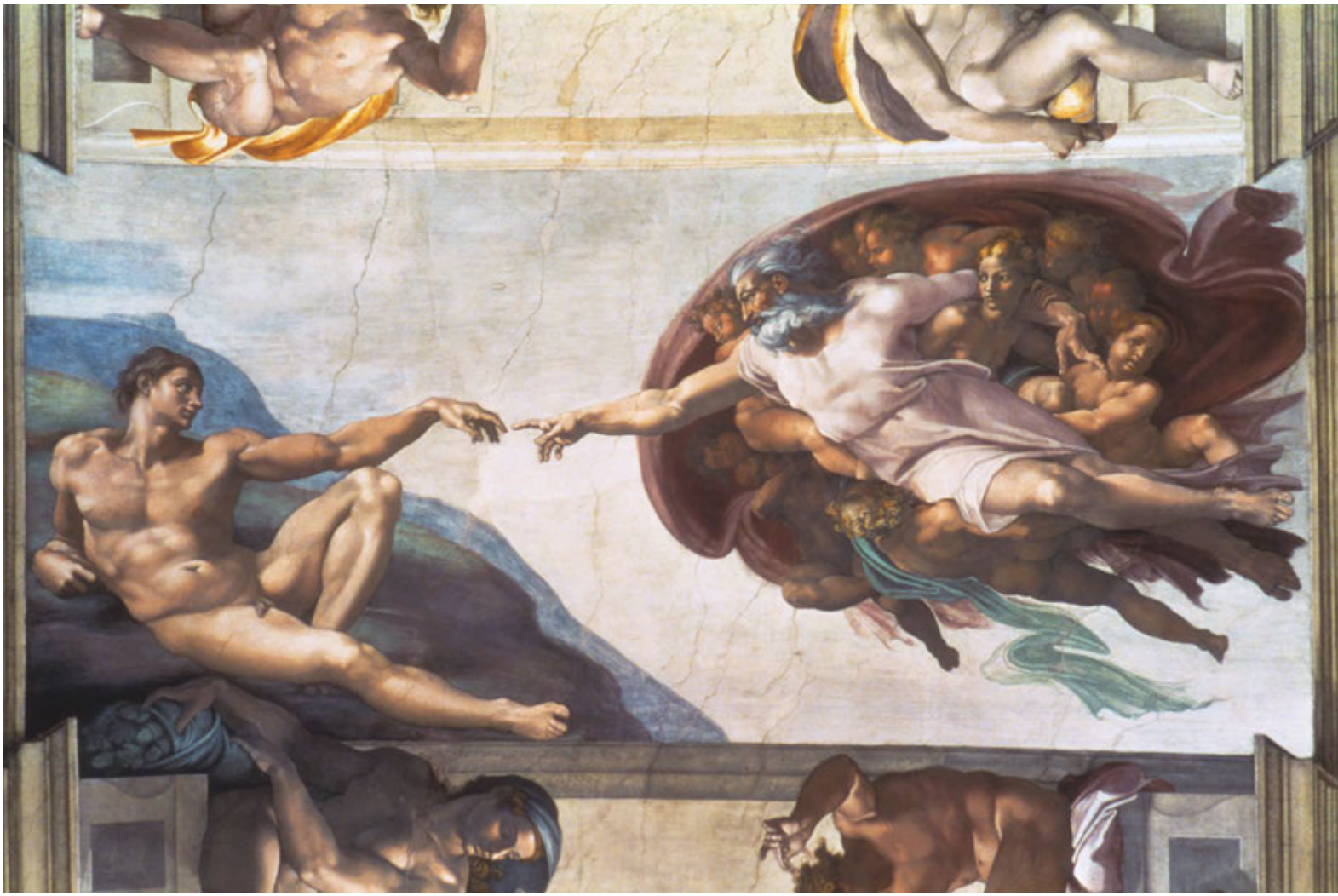
At the end of the 16th and beginning of the 17th centuries, the Italian Baroque artist Michelangelo Merisi da Caravaggio painted a triad of canvases for a small chapel in the Roman church of San Luigi dei Francesi. The chapel had been founded by Matthieu Cointerel, a wealthy French cardinal better known by the Italian version of his name: Matteo Contarelli. Contarelli died in 1585, and his heirs commissioned Caravaggio to complete the plans for the altar of Contarelli's church.

Caravaggio's commission came in the wake of a posthumous indictment against Cardinal Contarelli for abusing his high position as papal datary by funneling large sums of Church money into his own pocket. Contarelli's heirs, embarrassed by the crime, likely instructed Caravaggio to make the paintings into a kind of public penance for the late cardinal. By depicting Matteo Contarelli's name saint—St. Matthew—Caravaggio uses the story of the evangelist's conversion as a model for the cardinal's restitution.[22]

Among these three paintings, *The Calling of St. Matthew* foregrounds the themes of confession and conversion with particular force. The scriptures identify St. Matthew as a tax collector, whom Jesus found "at the receipt of custom" and to whom he said, "Follow me."[23] That call is the dramatic high point of the composition, even though Christ is at first difficult to recognize. Looking like an ordinary Italian man with a halo barely visible, he gestures to St. Matthew from the shadows on the right edge of the canvas.

Caravaggio painted during the aftermath of the great Tridentine Reform of the Church. Also known as the Counter Reformation, this movement reasserted Roman Catholic doctrine in the face of Protestant heresies, sought to cleanse the Church of abuses, and actively promoted didactic, inspiring, and devotional works of art. In this vein, Caravaggio's revolutionary compositions are extremely relatable and involve the viewer in a deeply faith-promoting way. In fact, Caravaggio leaves a place for the viewer at the table where St. Matthew and his fellow publicans sift through their money. A worshiper in Contarelli's chapel could imaginatively scoot up a chair, enter the biblical narrative, and join the evangelist in considering the Lord's timeless invitation to choose him over the cares of the world.

The dramatic beam of light coming from the right follows the angle of Christ's pointing finger and shines down on St. Matthew's face.[24] The other two tax collectors at the far end of the table are completely oblivious to this climactic event. One of them even wears corrective lenses to underscore his sharp vision, and yet he is spiritually blind, totally unaware that God



Michelangelo Buonarroti (1475–1564). Sistine Chapel. *The Creation of Adam.* Ca. 1511. Photo: Erich Lessing / Art Resource, NY.

himself stands in the room and beckons. The second publican bends forward and peers intently at the money. St. Matthew finds himself caught between two poles—the pointed gesture of Christ on the one hand and his lucrative trade on the other. In a moment he will make his choice, as will the pious viewer imaginatively sitting at the table with him, for in the words of St. Matthew's own gospel, "[y]e cannot serve God *and* mammon."[25]

Significantly, the evangelist parrots the Lord's gesture, pointing to himself as if seeking affirmation that he has interpreted the call correctly. His pointing finger, however, specifically gestures to his own heart, anticipating another passage from his gospel that comments on spiritual versus physical wealth: "For where your treasure is, there will your heart be also."[26]

Christ's gesturing hand is an artistic "quotation" directly lifted by Caravaggio from Michelangelo's famous *Creation of Adam* on the Sistine Chapel ceiling. In that fresco, God the Father extends his arm, having just ignited Adam with "the breath of life."[27] Adam holds his left hand in the gesture emulated by Caravaggio, pointing to God as the divine origin of his newly "living soul."[28] St. Paul famously identified a theological link between Christ and Adam upon which Caravaggio's "quotation" depends. Christ becomes the "new Adam" who redeems the parent of the human race and all his descendants: "For since by man came death, by man came also the resurrection of the dead. For as in Adam all die, even so in Christ shall all be made alive."[29]

In medieval and early modern theology, after God had created Adam and Eve "in his own image,"[30] they "disfigured" their divine resemblance to him with sin. In order for the exiled descendants of Adam and Eve to regain paradise, God created *another* man in his own image: Christ, who St. Paul describes as "the image of God," "the image of the invisible God," and "the express image of his person."[31] It is Christ's perfect and untainted likeness to God that empowers him to save a fallen world and invite even the most disfigured children of Adam and Eve to come and follow him. The gesture of Caravaggio's distressingly ordinary, even grimy-looking Jesus identifies him as the "new Adam," calling St. Matthew to be *re*created.[32]

"Follow me," he seems to say, "and I will make you a fisher of men, I will make you an apostle, I will make you an evangelist, I will make you a martyr for my name."[33]

Recall that post-Reformation Europe was riven with turmoil, with Protestants and Catholics killing one another. This was also an era of zealous evangelization efforts when priests risked their lives to minister to underground Catholics in hostile nations and the great Jesuit missions took Christianity to far-flung corners of the globe. Caravaggio's painting, with its swooping diagonal lines, viewer-involving composition, and theatrical contrast of inky black with brilliant highlights, was intended to confront viewers with the zeal of Tridentine Europe. Visitors to Contarelli's chapel should ask themselves, "Is Christ calling me? Have I given him my heart? Am I in danger of choosing mammon, heresy, or vices instead of him?"[34]

The converting call of the painting is also the confession of another Matthew—a Matteo fixated on money to such an extent that he became a 17th-century incarnation of the hated tax collectors employed by ancient Rome.[35] Petitions were made for Contarelli's soul at the altar in his chapel, and the surrounding paintings voice the hope that the light of Christ, which in Caravaggio's composition pierces the darkness to shine on St. Matthew, might reach even the soul of Cardinal Matteo suffering in purgatory.[36]

Interestingly, full restitution was never made for Contarelli's crimes. The breadth of his mismanagement of funds was so great that Pope Sixtus V closed the case, fearing international repercussions.[37] In a sense, Caravaggio's painting itself functions as a recompense for Contarelli's embezzlement, both symbolically and literally. As if acting for the cardinal by proxy, St. Matthew leaves his nets and follows Christ,[38] modeling the repentant behavior Contarelli failed to pursue. Again acting in the cardinal's behalf, Contarelli's heirs appropriated a portion of his tainted inheritance to beautify a holy place, giving a form of retribution to the demands of divine justice.

MATERNAL ADVOCACY

Johannes Vermeer, who like Caravaggio was active in the 17th century, is one of the most beloved painters of the Dutch Golden Age. He came from the city of Delft in the Netherlands and was known for his meticulously crafted canvases, usually filled with natural light and virtuosic renderings of texture. Vermeer's works often feature solitary women in the corner of a room, absorbed in a household task.

The subject matter of Dutch art shifted dramatically after the Reformation. The Netherlands were largely converted to Protestantism, especially Calvinism, which had an extreme intolerance for figural representations of God, Christ, angels, and saints. During the second half of the 16th century, groups of Calvinists in the Low Countries engaged in iconoclastic riots, systematically breaking and pillaging the stained glass, statues, and paintings of Catholic churches. The Iconoclastic Fury (*Beeldenstorm*) had been quelled by the time Vermeer began painting, but Dutch society still looked askance at traditional religious art. The prosperous middle class in the Dutch Republic favored smaller paintings of cityscapes, landscapes, still life, portraiture, and genre scenes. This last category characterizes much of Vermeer's output, namely images of daily life.

Vermeer's *Woman Holding a Balance* appears, at first, to be a typical genre scene. A well-dressed woman stands pensively in a corner, occupied with a balance and jewelry boxes. In the past, the painting was interpreted as a "moralizing genre scene," following a popular Calvinist tradition of communicating a heavy-handed moral by depicting foolish men and women engaged in vices. Under this assumption, Vermeer's woman would be a demonstration of avarice, as she weighs her jewels.[39] In fact the painting was even initially titled *A Woman Weighing Pearls* to foreground this interpretation. When close examination revealed that there was not so much as a shadow of a pearl on her scales, however, the painting was retitled and its message reconsidered.[40] Indeed, it is difficult to look at this beatific, quiet woman and seriously label her as a corrupt exemplar of avarice.

Rather, this is a painting about good motherhood. The highest ideal for a 17th-century Dutch woman was to be a noble mother who instructed her children in right and wrong and raised promising citizens for the new republic.[41] Vermeer's woman has a slightly protruding belly, which may indicate that she is pregnant. Holding one of the most ancient emblems of justice in one hand, this mother seems to be pondering much weightier things than the worth of her jewels. In fact, she is likely musing on her duty to teach her unborn baby. That maternal instruction will not only affect the child's ability to weigh between right and wrong but will ultimately affect his or her fate at Judgment Day when weighed in God's scales.

The Dutch were remarkably tolerant of different religious groups in their republic. They knew what persecution felt like, having endured the violent enforcement of religious orthodoxy under the rule of the Spanish King Philip II and his successors, followed by harsh Protestant and Catholic regimes in the southern Low Countries. As a result, the newly formed Dutch Republic had an open-door policy to all forms of Protestantism, and the government even offered Jews relative freedom. All were welcome, with the exception of Catholics. And yet even though mass was prohibited and priests were outlawed, the authorities tended to turn a blind eye to the many Catholics in the Netherlands. There is strong evidence that Vermeer was one of these underground believers.[42] Catholic references in his paintings range from brazenly overt to quite subtle. The full depth of maternal advocacy invoked by *Woman Holding a Balance* is only realized when its Catholic overtones are considered.

It is difficult to discount the shadow of the Virgin Mary that hovers over this expectant young mother in a blue coat with a white scarf draped over her head.[43] Blue and white are traditional colors for the Virgin, and during this same period the Spanish Church insisted that artists dress the Mother of God in white and blue when depicting the Immaculate Conception.[44] Immaculate Conception images envision the Madonna according to St. John's vision of a woman "with child," recorded in the book of Revelation: "And there appeared a great wonder in heaven; a woman clothed with the sun, and the moon under her feet, and upon her head a crown of twelve stars."[45] It may be significant, in this regard,

that Vermeer's woman wears a sun-gold dress with her pregnant belly swathed in a glowing patch of sunlight.[46]

Behind the woman, a Last Judgment scene hangs on the wall, with the dead rising from their graves while saints and apostles flank Christ. The woman seems to join the cast of characters behind her, taking the role of the tenderly interceding Virgin. Her downcast eyes draw attention to the hordes of newly resurrected men and women who appear to clamor around her face, as if raising their arms to call on her gentle advocacy.

The interpretation of the woman as a middle-class Dutch mother is by no means mutually exclusive with Vermeer's evocation of the Virgin Mary. In Roman Catholic theology, the Lord's beloved mother is also the spiritual mother of all Christians, so appointed by Christ himself when, looking down from the cross on Calvary, he commanded St. John—and all believers by implication—to "[b]ehold thy mother!"[47] The faithful call on Mother Mary to advocate for them, just as any good mother advocates for her children, trusting that her intervention can shift the balance in the scales at the Last Day.

In a way both domestic and eternal in scope, Vermeer enshrines maternal advocacy at the heart of his painting. A tender Marian prayer known as the *Salve Regina* resonates with the imagery of *Woman Holding a Balance* and brings together the forces of divine justice, clemency, and advocacy in the early modern Christian cosmos. Most practicing Catholics would have been intimately familiar with the *Salve Regina*, and many could have recited it by heart:

Hail Holy Queen, Mother of Mercy. Hail our life, our sweetness, and our hope. To thee do we cry, poor banished children of Eve; to thee do we send forth our sighs, mourning and weeping in this vale of tears. Turn then, most gracious advocate, thine eyes of mercy toward us and after this our exile show unto us the blessed fruit of thy womb, Jesus. O clement, O loving, O sweet Virgin Mary![48]

EMULATING HEAVENLY COURTS

Imitation played a pivotal role in early modern Christian devotion, with believers striving to conform themselves to Christ. Images of law and justice bear witness to a similar model of imitation. Civic trials emulated the heavenly court, the Church preached the Final Judgment of all souls, and the faithful petitioned the mediating Lamb of God for mercy and asked his hosts of saintly advocates for prayers. The sacred and the secular were closely wound in all aspects of European culture, including the law. At the crux of the intersection of scriptural mandates, legends, legal precedents, and pictorial expositions of jurisprudence was the "Judge of all the earth," who perfectly exemplifies his own command "to do justly, and to love mercy."[49] cm

Johannes Vermeer (1632–1675). *Woman Holding a Balance.* Ca. 1664. Photo: Art Resource, NY.

NOTES

1 On this practice, see Eric R. Varner, *Mutilation and Transformation: Damnatio Memoriae and Roman Imperial Portraiture* (Leiden, Netherlands: Brill, 2004).

2 See David Freedberg, *The Power of Images: Studies in the History and Theory of Response* (Chicago: University of Chicago Press, 1989), 5–9.

3 See Nicole Veronee-Verhaegen, *L'Hôtel-Dieu de Beaune* (Brussels: Centre National de Recherches Primitifs flamands, 1973), 33; Barbara G. Lane, "'Requieum aeternam dona eis': The Beaune 'Last Judgment' and the Mass of the Dead," *Simiolus: Netherlands Quarterly for the History of Art* 19, no. 3 (1989): 177–78.

4 On Christ's impartiality, see Honorius Augustodunensis's *Elucidarium*, an important 12th-century source text for Rogier's painting; see Clifford Teunis Gerritt Sorensen, trans., "The Elucidarium of Honorius Augustodunensis: Translation and Selected Annotations" (master's thesis, Brigham Young University, 1979), 170.

5 Revelation 5:12.

6 Matthew 25:34. "Venite benedicti patris mei possidete paratum vobis Regnum a constitucione mundi."

7 Matthew 25:41. "Discedite a me maledicti in Ignem eternum qui paratus est dyabolo et angelis eius."

8 For a summary of the Beaune Altarpiece's comparison to Saint-Lazare in the literature, see Lane, "'Requieum aeternam dona eis,'" 172 and note 37.

9 See Erwin Panofsky, *Early Netherlandish Painting: Its Origins and Character*, vol. 1 (Cambridge, MA: Harvard University Press, 1953), 270.

10 Job 1:21.

11 On Christ's consonance with Apollo and other sun images in the fresco, see Valerie Shrimplin-Evangelidis, "Sun-Symbolism and Cosmology in Michelangelo's Last Judgment," *Sixteenth Century Journal* 21, no. 4 (Winter 1990): 607–44.

12 See Arnold Hauser, *The Social History of Art* 2 (New York: Vintage Books, 1957), 97–106; Walter Friedländer, "The Anticlassical Style," in *Mannerism and Anti Mannerism in Italian Painting*, in Interpretations in Art: A Series of Columbia University Press (New York: Columbia University Press, 1990), 3–43; Malcolm Campbell, "Mannerism, Italian Style," in *Readings in Italian Mannerism*, ed. Liana De Girolami Cheney, in American University Studies, series 20: Fine Arts, vol. 24 (New York: Peter Lang, 1997), 247–72, esp. 256–59; Liana De Girolami Cheney, "Vasari's Position as an Exponent of the Maniera Style," in ibid., 9–11; Max Dvořák, "El Greco and Mannerism," in ibid., 204–06.

13 Matthew 16:19.

14 See Bernadine Barnes, "Skin, Bones, and Dust: Self-Portraits in Michelangelo's 'Last Judgment,'" *Sixteenth Century Journal* 35, no. 4 (Winter 2004): 969–86.

15 On Christ's hand gestures, see Bernadine Barnes, *Michelangelo's Last Judgment: The Renaissance Response* (Berkeley: University of California Press, 1998), 34–36.

16 I am grateful to my friend and colleague Mark Magleby, director of the BYU Museum of Art, for this insight.

17 See Giorgio Vasari, *The Lives of the Artists*, trans. Julia Conaway Bondanella and Peter Bondanella (Oxford: Oxford University Press, 1991), 461–62.

18 John 7:24; Micah 6:8; see Hugo van der Velden, "Cambyses for Example: The Origins and Function of an Exemplum iustitiae in Netherlandish Art of the Fifteenth, Sixteenth, and Seventeenth Centuries," *Simiolus: Netherlands Quarterly for the History of Art* 23, no. 1 (1995): 5–62.

19 See Maryan W. Ainsworth, *Gerard David: Purity of Vision in an Age of Transition* (New York: The Metropolitan Museum of Art, 1998), 66.

20 See ibid., 62, 70, 72.

21 On the interpretations of these classical roundels, see Hans J. van Miegroet, "Gerard David's 'Justice of Cambyses': Exemplum iustitiae or Political Allegory?" *Simiolus: Netherlands Quarterly for the History of Art* 18, no. 3 (1988): 126–28.

22 On the Contarelli scandal and the penitential retooling of his image, see Irving Lavin, "Caravaggio's Calling of St. Matthew," in *Past–Present: Essays on Historicism in Art from Donatello to Picasso* (Berkeley: University of California Press, 1993), 85–99, esp. 98–99; Alice Sedgwick Wohl, "Light and Dark in the Contarelli Chapel: A Reconsideration of Caravaggio's Images of Saint Matthew," *Studi secenteschi* 50 (2000): 249–50. On the history of the chapel, including its administration by Matteo Contarelli's heirs, see Jacob Hess, "The Chronology of the Contarelli Chapel," *Burlington Magazine* 93, no. 579 (June 1951): 186–201.

23 Matthew 9:9.

24 Although not forcefully relevant to the argument of this article, there is scholarly disagreement about the identity of St. Matthew in Caravaggio's painting. For two sides of the argument, see Lavin, "Caravaggio's Calling of St. Matthew," 85–99, and Sedgwick Wohl, "Light and Dark in the Contarelli Chapel," 229–58.

25 Matthew 6:24, italics added.

26 Matthew 6:21.

27 Genesis 2:7.

28 Ibid.

29 1 Corinthians 15:21–22.

30 Genesis 1:27.

31 2 Corinthians 4:4; Colossians 1:15; Hebrews 1:3.

32 For a related analysis, see Lavin, "Caravaggio's Call of St. Matthew," 95, 97.

33 See Matthew 4:19.

34 On the universality of Christ's call, see Lavin, "Caravaggio's Calling of St. Matthew," 98.

35 See Sedgwick Wohl, "Light and Dark in the Contarelli Chapel," 250.

36 See ibid.

37 See Lavin, "Caravaggio's Calling of St. Matthew," 98.

38 See Matthew 4:20.

39 Herbert Rudolph, "Bedeutung mittelalterlicher und humanistischer Bildinhalte in der niederländischen Malerei des 17 Jahrhunderts," *Festschrift Wilhelm Pinder zum 60. Geburtstag* (Leipzig: E. A. Seemann, 1938): 408–09; see also Ludwig Goldscheider and Johannes Vermeer, *The Paintings: Complete Edition* (London: Phaidon Press, 1967), 27; for the moralizing tradition in 17th-century Netherlandish painting as it relates to pearls in Vermeer's *The Allegory of Faith*, see E. de Jongh, "Pearls of Virtue and Pearls of Vice," *Simiolus: Netherlands Quarterly for the History of Art* 8, no. 2 (1975–76): 69–97.

40 See Ivan Gaskell, "Vermeer, Judgment, and Truth," *Burlington Magazine* 126, no. 978 (September 1984): 557–61, esp. 557.

41 See Martha Moffitt Peacock, "Geertruydt Roghman and the Female Perspective in 17th-Century Dutch Genre Imagery," *Woman's Art Journal* 14, no. 2 (Autumn 1993–Winter 1994): 3–10, esp. 8.

42 See David R. Smith, "Vermeer and Iconoclasm," *Zeitschrift für Kunstgeschichte* 74, no. 2 (2011): 193–216; J. M. Montias, "Vermeer and His Milieu: Conclusion of an Archival Study," *Oud Holland* 94, no.1 (1980): 44–62.

43 For a discussion of Roman Catholic theology, allusions to the Virgin Mary, and the implications of the pregnant protagonist of Vermeer's painting, see Nanette Salomon, "Vermeer and the Balance of Destiny," in *Essays in Northern European Art Presented to Egbert Haverkamp-Begemann on His Sixtieth Birthday* (Doornspijk: Davaco Publishers, 1983), 216–21.

44 See Suzanne L. Stratton, *The Immaculate Conception in Spanish Art* (New York: Cambridge University Press, 1994).

45 Revelation 12:1–2.

46 I am grateful to a student in my ARTHC 202: World Civilization Since 1500 course at Brigham Young University for this insight.

47 John 19:27.

48 "Salve Regina, mater misericordiae, vita, dulcedo et spes nostra, salve. Ad te clamamus, exsules filii Hevae. Ad te suspiramus, gementes et flentes in hac lacrimarum valle. Eja ergo, advocata nostra, illos tuos misericordes oculos ad nos converte. Et Jesum, benedictum fructum ventris tui, nobis post hoc exsilium ostende. O clemens, o pia, o dulcis Virgo Maria."

49 Genesis 18:25; Micah 6:8.

Two Generations of BYU Law

By Rebecca Walker Clarke

Left to right: Anne Newton McFadden, Kleinhenz's cousin and associate dean of placement at Indiana University's Maurer School of Law in Bloomington, Indiana; Hillary Newton Kleinhenz; and Judge Christopher Newton.

When Hillary Newton Kleinhenz, '18, was sworn in to the Indiana State Bar on May 14, 2019, it was "powerful and special," Kleinhenz recalls. "Walking into the Indiana Roof Ballroom before the Indiana Supreme Court justices, magistrates, and federal judges felt intimidating and yet comfortable." It was made even more memorable for her when Chief Justice Loretta Rush asked Kleinhenz to stand and then introduced her to the other inductees and the entire audience. Judge Rush used this introduction to make sure everyone knew why Judge Christopher Newton, '89, had been chosen to swear in the 2019 inductees: Judge Newton is Kleinhenz's father.

Following in Her Father's Footsteps

Growing up, Kleinhenz had a lot of interaction with attorneys and judges because of her father's profession. She felt a pull toward law school, so after earning a bachelor's degree from Utah State University, Kleinhenz followed in her father's footsteps and attended BYU Law.

She explains that the opportunities to serve during law school were the most valuable aspect of her education: "I believe BYU Law excels in preparing students to enter the workforce and be thoughtful, intentional, and hardworking attorneys, and it goes beyond that by encouraging pro bono and volunteer efforts. Participating in the Public Interest Law Foundation for three years, [taking] two trips to Dilley, Texas, and working under Professor Carl Hernandez to open the Community Legal Clinic are among my most valuable experiences at BYU Law."

Kleinhenz has most recently been the recipient of a BYU Public Service Fellowship for her work at the Office of the Federal Public Defender in Del Rio, Texas, and at the Vigo County Public Defender's Office in Terre Haute, Indiana. In addition to criminal defense, she hopes to do more public interest work. As a military spouse, Kleinhenz wants to help each state provide better benefits, both legal and nonlegal, to spouses of veterans and those serving in active duty and the reserves. She belongs to the Military Spouse JD Network, which is an organization that advocates for licensing accommodations

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—HILLARY NEWTON KLEINHENZ

for military spouse attorneys, provides education about the challenges of military life, and offers a network of support. Her hope is to use her law degree "to be an advocate each day."

A Life-Changing Experience

Almost three decades before his daughter Hillary walked through the doors of the J. Reuben Clark Law School, Judge Newton began creating his own path through the law. Newton describes his BYU Law education as a "marvelous experience." He was the vice president of the Student Bar Association and worked closely with then dean Bruce C. Hafen and then associate dean H. Reese Hansen. Because of his involvement in student government, Newton knew almost everyone in his class. "Some I'm still very close to, and we still speak on a weekly or monthly basis," he says. "The professors and administrators were excellent and truly cared about us, and we loved them too."

After graduating from BYU Law in 1989, Newton became an associate and partner in the Indiana law firm Wright, Shagley & Lowery PC until his election as Vigo Superior Court Division IV judge in 2004. Newton was reelected and unopposed in 2010 and 2016 and has served for three terms as chief judge of the Vigo Superior Courts. He is now the longest-serving judge in Vigo County.

As much as BYU Law prepared him for the rigors of his professional life, one of Newton's law professors, Ray J. Davis, taught Newton a life-changing lesson: "[Davis] told us the purpose of the Law School wasn't to prepare us as lawyers but to eventually prepare us for service to the Church." That principle has been a guiding one in Newton's life. Newton has remained a devoted and service-oriented member of The Church of Jesus Christ of Latter-day Saints. He has served as Young Men president at both the ward and stake levels, as a bishop, and as a counselor in a stake presidency. He is currently the second counselor in the Indiana Indianapolis Mission presidency, serving with Darryl Carlson, '78, also a BYU Law graduate.

The Greatest Honor

Newton says that although a life in the law is rewarding, there are difficulties that accompany it: "I've had a lot of great things happen in my career. Much of what I do as a judge, however, is sad. People are losing their liberty, their families, their money, and their property." Newton offsets some of this sadness by performing more marriages in the county than anyone else—"in part because it allows me to do something happy," he says. This has earned him the nickname "Love Judge" among his staff.

He recounts that the experience of swearing in Kleinhenz was one of the happiest things he has been able to do. "I was seated next to the Indiana attorney general, Curtis Hill. He turned to me and asked, 'What was the better day: her birth or today?' I thought for a moment and said, 'Today. It was wonderful when she was born. She was the third of four children, and at that time we only had hope. We didn't know what she would do with her life,'" he remembers.

Newton appreciates his daughter and the chance to be a part of her career and life. "Hillary is a beautiful person, inside and out," he says. "She is kind, faithful, fun, talented, hard-working, and efficient. Watching her go through the process of taking the bar was excruciating. It was the hardest thing ever for both of us, but it was worth it. Swearing her in to the Indiana Bar has truly been the greatest honor of my professional career. It was a great day for our entire family."

On Immigration and the Law

A CONVERSATION WITH ALICIA A. CALDWELL OF THE *WALL STREET JOURNAL* AND PROFESSOR SHOBA SIVAPRASAD WADHIA OF PENN STATE LAW

BYU Law hosted the Fifth Biennial Emerging Immigration Scholars Conference on June 7–8, 2019. The conference provides a forum for emerging immigration law scholars to receive and provide feedback on scholarship, attend panel discussions that focus on issues relevant to their careers, and connect with colleagues from across the country. The conference is especially geared toward immigration law professors who are pre-tenured. For the keynote, Alicia A. Caldwell interviewed Shoba Sivaprasad Wadhia about current immigration litigation. An excerpt of their conversation follows.

Caldwell: If I am honest, I hate doing this—I hate covering immigration right now. But I am happy to discuss this topic and interview Shoba to the degree that I can. She obviously knows more than I do. I like to describe my understanding of immigration as peeling an onion, and then I find a new onion and I peel again, and about four layers in, there's a kumquat. I don't know how the fruit got in there, but now it's a completely different animal. Then I have to start calling you all so that you can help me understand what just happened. And litigation is one of those topics because it is changing, as you all know, on a minute-by-minute basis some days.

We'll start with the travel ban. What's going on?

Wadhia: So as this room is most aware, we have a ban. Some call it the Muslim ban. We've had three versions, and the third version was operationalized on December 4, 2017, well before the Supreme Court had even made a decision about its legality or likely lawfulness. On June 26, 2018, Chief Justice Roberts, writing for a 5 to 4 Court, found that the ban was likely lawful, both under the immigration statute and under the U.S. Constitution. He premised his rationale on a couple of things. First, the statutory section that was used by the administration to enact the ban, section 212(f) of the Immigration and Nationality Act (INA), is something he found to be broad and to exude deference to the president in every clause. Second, he also found no conflict or clash between this broad statute, which gives the president authority to suspend the entry of any alien or any class of aliens, and another provision, section 202(a) of the INA, which says you cannot discriminate on the basis of sex, place of birth, nationality, and so on when it comes to the issuance of immigrant or permanent visas. And the likely constitutionality was upheld because he found in a new rational basis test that there was a legitimate purpose to the ban.

What's happening now is really interesting because the case was remanded. What that means is that lower courts have the opportunity to still hear challenges to the ban in light of the Supreme Court's decision in *Trump v. Hawaii*. There are right now at least two cases that are pending and percolating through the courts that the administration wants thrown out in light of *Trump v. Hawaii*, but judges have entertained the idea of having the cases move forward. One is in the Northern District of California and the other is in the state of Maryland.

I think one of the more interesting cases is *Emami v. Nielsen*. It relates to how the waiver process is working. Waivers are in some viewpoints a sham and in other viewpoints a safety valve that held the ban together. People who are covered by the ban can apply for a waiver if they can show that denying them entry would result in undue hardship, that their entry is in the national interest, and that they are not a danger to the national security.

Caldwell: Let's talk about the asylum ban and the Remain in Mexico policy, or Migration Protection Protocols (MPP)—although I do not understand them. No one does, if we're being honest. There is currently a backlog of 860,000 or 890,000 cases. Not all are asylum cases, but they are immigration cases. We know that the vast majority of people, family units in particular and unaccompanied children, are asking for asylum. Those apprehended at the border—and that's a weird way to describe it since most people are surrendering—are not getting credible fear screenings, by and large. But some are now being sent back to Mexico. What is happening there in terms of both the asylum ban litigation and the MPP, or Remain in Mexico, litigation? They seem tied together but just disparate enough.

Wadhia: There is a lot happening around asylum, and they are tied together in the overall agenda that this administration has with regard to our asylum system and our asylum laws. I'll take up the asylum ban first because it was rolled out earlier, in November 2018. It was issued through two tools: the first is known as an interim final rule, and the second is known as the proclamation, which is the same tool used in the travel ban. The asylum ban makes any person who arrives at a place other than a port of entry or in between a port of entry ineligible for asylum. That was controversial because it very explicitly clashes with our immigration statute in section 208 that says no matter how you enter the United States, any person may apply for asylum.

Just to get a little nerdy here: It's really hard to talk about these policies because they are not in the U.S. Constitution; this is an interim final rule. So what does that mean? For administrative law lovers in the room, that simply means that the rule will go into effect immediately and then the comment period will happen afterward. It's a recurring theme that administrative law has really been the hook for a lot of the litigation we are seeing around these policies. The asylum ban was challenged front and center on statutory grounds in a case called *East Bay Sanctuary Covenant v. Trump*. Now we have a nationwide injunction that has been put into place by Judge Jon Tigar in the Northern District of California, and it's pending appeal in the Ninth Circuit Court of Appeals. So right now the asylum ban is not operational.

Contrast that with Remain in Mexico, which is an even harder legal argument to wrap your head around. It is largely statutory—at least that's what the courts have chosen to focus on. You have this Byzantine statutory section, which is 235(b) of the INA, and (b)(1) says there are types of people who can be processed for speed deportation under expedited removal. In which case, if they have a "fear," they have to then be transferred to an asylum office for a fear interview, and if they pass that interview, they have to be put in full-fledged proceedings.

But there is another section, 235(b)(2), that says that any of these people, and more, can just be placed in regular removal proceedings. And this is not only allowed under the statute but, long before MPP, was allowed as a matter of prosecutorial discretion. Customs and Border Protection (CBP) has always had prosecutorial discretion to decide to place somebody who is legally eligible for expedited removal in full-fledged removal proceedings, and, in fact, that's something I've argued for in my work. But here is the "Trumpian twist," a twist that is also in section 235(b)(2): the administration has discretionary authority to return people who have notices to appear in full removal proceedings to Mexico while their claim is pending.

The crux of the legal argument has been this question: If you are legally eligible for expedited removal under (b)(1) but you are processed under (b)(2), can you fall under this return provision under (b)(2)? The Ninth Circuit Court of Appeals has agreed enough that it stayed an injunction. This is what makes the Remain in Mexico policy alive today and makes the statutory conversation really confusing. It also ignores the other legal and policy concerns people

Alicia Caldwell (left) interviews Shoba Wadhia (right) about current immigration litigation.

have—including people in this room. For example, what about international norms and obligations? What about access to counsel? What about conditions in Mexico?

> *"I like to describe my understanding of immigration as peeling an onion, and then I find a new onion and I peel again, and about four layers in, there's a kumquat."*
>
> —ALICIA CALDWELL

Caldwell: The argument we are hearing from the administration is that this will stop the flow of migrants coming irregularly—illegally, in their words—and crossing the border between the ports of entry. And yet the numbers keep going up. There has been a relative trickle back to Mexico, just a few thousand people. That's going to expand. They are going to go from San Diego, California, to Brownsville, Texas. In theory, everybody will be eligible for MPP—except for those who are not eligible, and it is unclear to me who those other people are, other than non–Central Americans and Mexican nationals, and I think that might be it. Technically, there are some other rules in there, but it seems a little bit arbitrary. It also is not working.

Is the rhetoric coming from the White House that has been used in other litigation something that can be used here? In other words, the president has essentially said, "This will stop it. I'm using this as a punitive effort effectively." He did not use the word *punitive*, but I will, because that's the goal. It is not working. About 84,000 people in family units crossed the border illegally last month, which is a record high and eclipses previous single-year totals in a 31-day period. So something is going on.

Wadhia: Well, there are a few things here, right? I guess we should question how much should rhetoric even be involved in what the outcome in litigation looks like. We clearly have seen some combination and overlap in this administration. I think we are going to continue to see that the goals of MPP, assuming they are even legitimate, are not being met. We even saw that critique coming out of one of the judges, who sounded like he was dissenting but in fact agreed with the stay of the injunction.

I think it will be a failed experiment—if in fact the administration believes it is going to deter people. I have a very narrow window into the world of the people who are coming from Central America through Mexico to the border and ending up in the Keystone State of Pennsylvania, and they're either non-detained or they are detained in a family detention facility in Berks, a residential county. A policy like MPP is not going to deter any of the people I have spoken to or have met or consulted with because they're fleeing for their lives. Again, without acknowledging or thinking about the root causes for why people are leaving, we're not going to end up with a policy that's working. But we haven't had an administration that actually wants to meet the people who are affected by policy changes.

Caldwell: There's been lots of criticism by the administration about nationwide injunctions. A single sitting judge can say no and thus block the effort nationwide. Is that good or bad?

Wadhia: There's been a lot of crankiness around the use of nationwide injunctions. I have a few thoughts. First, I fall in the camp that our immigration law is federal. If we're in the midst of litigation being the rapid response to policies—because we do live in a world of checks and balances—we should have a uniform application. I'm okay with a nationwide injunction treating a policy similarly for the sake of uniformity. I also think it adheres with some of the administrative law values I support, like consistency and uniformity. I also think it's a little inaccurate to say that a single judge makes a decision because we've had a lot of policies that we just discussed in this hour where there have been multiple courts and judges issuing nationwide injunctions, so it's not necessarily by a single judge. Finally, I would say that I don't think the long-term solution is nationwide injunctions. I think those are necessary for responding to policy changes that violate our law, but ultimately, we're going to need a legislative solution.

This all makes for a great way to teach civics, like when my grandmother was studying for her citizenship test. You can sit down with your grandmother or kid and really do a close study of the three branches of government: where the executive is coming in with a policy, where courts are coming in to protect checks and balances and prevent overreach, and where Congress is trying to respond with either the American Dream and Promise Act or the No Ban Act to really respond to what is needed in the long-term legislatively.

Shoba Sivaprasad Wadhia, a professor at Penn State Law, is an expert on immigration law whose research focuses on the role of prosecutorial discretion in immigration law and the intersections of race, national security, and immigration. She has published more than 30 law review articles, book chapters, and essays on immigration law.

Alicia A. Caldwell covers immigration for the Wall Street Journal, *focusing on everything from border security to the impacts of immigration in the United States. She came to the* Wall Street Journal *from the Associated Press in August 2017 and has reported on immigration since 2005 from both El Paso, Texas, and Washington, DC.*

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J. REUBEN CLARK LAW SCHOOL
J. REUBEN CLARK LAW SOCIETY
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